89-1939

No. _____

In The

Supreme Court of the United States

October Term, 1989

TRI-STATE MOTOR TRANSIT COMPANY,

Petitioner,

vs.

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA, DIVISION 2

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QUESTION PRESENTED

WHETHER, BY REASON OF 49 U.S.C. § 11107 AND THE INTERSTATE COMMERCE COMMISSION REGULATIONS, AN AUTHORIZED INTERSTATE MOTOR CARRIER IS VICARIOUSLY LIABLE, AS A MATTER OF LAW, FOR THE NEGLIGENT OPERATION OF EQUIPMENT LEASED BY THE CARRIER, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

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OPINIONS BELOW

On September 5, 1989, the Court of Appeals for the State of Oklahoma, Division 2, affirmed the entry of a judgment notwithstanding the verdict by the District Court of Rogers County, Oklahoma. That judgment was entered in favor of Respondents and against Petitioner.

* The parent company of Tri-State Motor Transit Company is Tri-State Motor Transit Company of Delaware, which in turn has a parent company, TRISM, Inc. Both of these parent companies are Delaware corporations.

The opinion of the Oklahoma court of appeals is set forth in the Appendix at 1a through 5a.

JURISDICTION

As stated, the Oklahoma court of appeals affirmed the entry of a judgment notwithstanding the verdict against Petitioner on September 5, 1989. A petition for rehearing was later denied by that court on October 20, 1989. Thereafter, Petitioner timely filed a petition for writ of certiorari in the Oklahoma supreme court. Certiorari was denied by that court on March 12, 1990.** The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1990).

STATUTES AND REGULATIONS

Statutes:

1. 49 U.S.C. § 10521 (1990)..... See Appendix, 19a
2. 49 U.S.C. § 11106 (1990)..... See Appendix, 20a
3. 49 U.S.C. § 11107 (1990)..... See Appendix, 20a

Regulations:

49 C.F.R. § 1057 (1985).....See Appendix, 21a

** For purposes of the present petition, therefore, the opinion of the Oklahoma court of appeals is "final" within the meaning of 28 U.S.C. § 1257(a). *See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954). Further, the present petition is timely filed in accordance with the rules of this Court. S. Ct. Rule 13.1 (1990).

STATEMENT

The material facts of this case are not in dispute. Petitioner, Tri-State Motor Transit Co. ("Tri-State"), is a Delaware corporation with its principal place of business in Joplin, Missouri. Since 1935, Tri-State has engaged exclusively in the business of transporting freight both intrastate and interstate. Tri-State is authorized by the Interstate Commerce Commission ("ICC" or the "Commission") to haul freight as an interstate carrier to and from all points in the country under certificate number ICC MC 109397.

On August 27, 1984, Tri-State entered into a one-year renewable lease agreement with Elvis Boren ("Boren").[1] (Appendix at 27a through 35a). Under that written agreement (known as a "Hot Shot Contract"),[2] Tri-State leased, as lessee, a one-ton C-30 Chevy truck and a 1984 Starlite trailer from Boren, as lessor. The truck and trailer were used by Boren to haul freight on behalf of Tri-State.

Boren testified in the trial below that, pursuant to his arrangement with Tri-State, he typically would call the Tri-State terminal in Joplin, Missouri and request that his name be put on a "board" from which the dispatcher would distribute hauling jobs on a first-in, first-out

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[1] At the time of the accident giving rise to the lawsuits below, Tri-State employed approximately 1,100 power units in its business. Twenty percent of those units were owned by the company; the remaining units were leased by Tri-State and operated under its intrastate and interstate licenses.

[2] The term "hot shot" denotes a one- or two-ton truck used to haul freight. Essentially, a hot shot is a smaller version of a semi-tractor, which generally weighs between eight and ten tons.

basis.[3] Further, Boren testified that although Tri-State would occasionally call him and request that he make certain hauls, Boren was under no obligation to accept. Boren also stated that he was free to use his truck (of which he maintained physical possession) for personal use when not hauling freight for Tri-State.

The lease between Tri-State and Boren was effective from August 27, 1984, until December 22, 1985. On the latter date, Tri-State was to, and did in fact, obtain a receipt of cancellation as is required by ICC regulations. See 49 C.F.R. § 1057.11(b) (1985).[4] Throughout the effective term of the lease, Tri-State's logo and ICC certificate number were displayed on Boren's truck in conformity with the Commission's regulations. See 49 C.F.R. § 1057.11(c) (1985).

Boren's last haul for Tri-State concluded on October 18, 1985. Despite the fact that he was still under lease to Tri-State through December 22, 1985, Boren chose not to make any further hauls because of the pregnancy of his wife and her impending delivery date. From October 18,

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[3] In essence, when a driver's name reached the top of the board, the dispatcher would contact the driver and inform him or her that a shipment was available. If the driver decided to make the haul, he or she would proceed to the designated terminal. After the truck entered the terminal, Tri-State employees would inspect it. If the truck passed Tri-State's safety inspection, the freight would be loaded. The driver would then haul the freight to its destination and proceed to the nearest Tri-State terminal for further dispatching.

[4] The portions of 49 C.F.R. § 1057 in effect at the time of the accident are set forth in the Appendix, beginning at page 21a and are set out herein where appropriate. Unless otherwise indicated, all references herein are made to the 1985 version of that regulation.

1985, until November 29, 1985, the date of the accident giving rise to the lawsuits below, Boren had therefore been using his truck solely for personal use.

On the evening of November 29, 1985, Boren drove his truck "bob-tail" (*i.e.*, without a trailer) less than one mile from his home in Talala, Oklahoma to a local restaurant located on U.S. Highway 169. Boren testified that he intended to purchase dinner at the restaurant and then return home. While approaching the turn into the restaurant's parking lot, Boren slowed to a stop in the northbound lane of U.S. 169 to allow an oncoming southbound vehicle occupied by Respondents to pass. Before Respondents' vehicle could pass and allow Boren to turn into the parking lot, a northbound car driven by William Marlin ("Marlin") came up behind Boren's truck. Marlin, unable to stop in time to avoid a collision with the truck, swerved into the southbound lane and collided head-on with Respondents' vehicle. As a result, Wayman Jones died and Janell Jones, Patty Jones and Laura Atkinson were severely injured. It was later alleged that the tail lights on Boren's truck were not functioning at the time of the accident. Three separate lawsuits were subsequently filed in the District Court of Rogers County, Oklahoma.[5]

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[5] Marlin filed suit against Tri-State, Boren and Protective Insurance Company (Tri-State's insurer) on January 23, 1986. This lawsuit was subsequently settled out of court. Respondent Atkinson filed suit against Marlin, Boren and Frances Kelley (the owner of the car driven by Marlin) on January 30, 1986. On June 6, 1986, however, Atkinson amended her petition to include Tri-State as an additional party-defendant. Respondents Patty and Janell Jones filed suit against Marlin, Boren, Tri-State, Protective Insurance and Kelley on May 13, 1986.

The Federal Question

The federal question involved in this case was raised in the district court pleadings. The petition of respondents Patty and Janell Jones alleged that Tri-State was liable for the acts of Boren in the operation of the leased vehicle, as Boren was operating his truck in interstate commerce and in the scope of his employment at the time the accident occurred. The Joneses' petition provided in part:

> 5. That on the 29th day of November, 1985, on U.S. Highway 169 in Talahla [sic], Oklahoma, *Elvis D. Boren, while acting within the scope of his employment as agent or employee of Tri-State Motor Transit Co., was operating a truck leased by Tri-State Motor Transit Co. and operated as a carrier in interstate commerce,* which vehicle had defective tail lights . . . [emphasis added].

(R#88 p.860).[6] Similarly, respondent Atkinson alleged in her petition:

> 25. That . . . Tri-State *leased the . . . truck from . . . Boren and thus had a duty to every person* and particularly to the Plaintiff to maintain said vehicle in a safe, lawful and reasonable operating condition, such that it did not present a safety hazard to other vehicles and pedestrians *on the public roads . . .*
>
> 27. That between . . . Tri-State and . . . Boren, there existed the relationship of employer/employee or agent/principal at the time of said accident. Thus, . . . Tri-State is liable

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[6] References to the record below are made by designating the "instrument number" assigned by the trial court and the page number on which the referenced information appears or begins.

> for the negligent actions of its representative, . . . Boren, under the doctrine of respondeat superior [emphasis added].[7]

(R#9 p.24).

In its respective answers to the petitions, Tri-State generally denied the above-quoted allegations and stated that Boren was neither its agent nor employee. Further, Tri-State alternatively alleged that Boren was not within the scope of employment at the time of the accident. (R#12 p.31; R#96 p.877).

As discovery progressed in the lawsuits, it became apparent that Respondents' claims against Tri-State were based exclusively on the notion that 49 C.F.R. § 1057 (1985) displaced traditional notions of respondeat superior and made Tri-State liable, as a matter of law, for the negligent acts of Boren, even if the acts would otherwise have been found under Oklahoma law to have occurred outside the scope of Boren's employment with Tri-State.

On May 6, 1987, Tri-State moved for summary judgment against Respondents. In its motion, Tri-State essentially argued that under the doctrine of respondeat superior, it was not liable for the negligence of Boren as Boren was not acting within the scope of employment at the time of the accident. Further, Tri-State maintained that the ICC regulations did not conclusively make an

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[7] Although Respondents further refined their arguments during the course of discovery and the proceedings, the *first* reference to the overlay of federal law on this action arose in the context of the pleadings. Through their respective petitions, Respondents were able to develop a theory that under paragraph 2 of Tri-State's lease with Boren and the applicable federal regulations, Tri-State was deemed to be completely responsible for the use of Boren's truck during the term of the lease.

authorized carrier liable for the negligent operation of leased equipment, irrespective of the use made of the equipment, and argued that it could be liable only if the leased vehicle was being operated under Tri-State's ICC authority. To substantiate this latter position, Tri-State relied on *Simon v. McCollough Transfer Co., Inc.*, 155 Ohio St. 104, 98 N.E.2d 19 (1951); *Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403 (6th Cir. 1967); *Gackstetter v. Dart Transit Company*, 269 Minn. 146, 130 N.W.2d 326 (1964); and *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968). (R#26 p.356).

In response to Tri-State's motion, respondent Patty Jones argued that: "A motor carrier which is licensed by the Interstate Commerce Commission is liable as a matter of law for injuries resulting from the acts of a driver even though the truck driver was not on a mission for the carrier and even though the carrier was unaware of the fact that the vehicle was being used in the way that it was used." (R#118 p.1117, citing *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983)). Respondents Janell Jones and Laura Atkinson made an identical argument in opposition to Tri-State's motion.[8] (R#31 p.415).

On June 8, 1987, after hearing oral arguments on behalf of each party, the trial court denied Tri-State's motion for summary judgment. (R#41 p.624). In doing so, the court relied exclusively on federal law. As the court stated: "I'm going to overrule the motion for summary judgment of Tri-State Motor Transit Company and cite as authority the case of *Rodriguez v. Ager* found at 705 F.2d

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[8] Arguments similar to those made in connection with the motion of summary judgment were proferred by Tri-State and Respondents in the Oklahoma court of appeals and to the Oklahoma supreme court.

1229, and find it is a Tenth Circuit case cited in 1983." (Transcript of Proceedings on June 8, 1987, at p. 29, lines 15-19). Tri-State subsequently filed a motion to reconsider which was also denied.

Respondent Atkinson's suit was consolidated for purposes of trial with the suit filed by respondents Patty and Janell Jones. After a five-day trial, the jury, on June 26, 1987, awarded Janell Jones $800,000.00, Patty Jones $800,000.00 and Laura Atkinson $70,000.00. (Transcript Vol. 4, p. 759). In apportioning the damages, the jury found Marlin to be thirty percent at fault and Boren to be seventy percent at fault. The jury exonerated Tri-State from all liability.[9] (R#66 p.767).

Thereafter, Respondents filed a motion for judgment notwithstanding the verdict against Tri-State. (R#73 p.778). On October 6, 1987, the district court sustained the motion, holding that Tri-State was vicariously liable, as a matter of law, for the percentage of negligence attributed

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[9] Significantly, the trial judge elected not to follow state law to the contrary and instructed the jury on the issue of Tri-State's liability as follows: "If you find that the truck driven by Elvis Boren on November 29, 1985, was subject to a lease between Elvis Boren and Tri-State Motor Transit Company for a use regulated by the Interstate Commerce Commission, then the acts and omissions of the Defendant, Elvis D. Boren, were in law the acts and commissions of the Defendant, Tri-State Motor Transit Company. Therefore, if you find Elvis Boren liable, Tri-State Motor Transit Company is vicariously liable for all injuries resulting from the negligence of Elvis Boren. AUTHORITY: *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983)." (R#64 p.730, Instruction No. 13). Nevertheless, the jury did not find Tri-State liable.

to Boren. (See Appendix at 12a). Final judgment was entered on November 3, 1987. (Appendix at 6a).

Tri-State appealed. On September 5, 1989, the Court of Appeals for the State of Oklahoma, Division 2, refused to apply state law and affirmed the district court's decision, basing its affirmation exclusively on *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983) and *McLean Trucking Co. v. Occidental Fire & Cas. Co.*, 72 N.C. App. 285, 324 S.E.2d 633 (1985).[10] (Appendix at 1a). Tri-State's petition for rehearing was denied by the court of appeals on October 20, 1989. (Appendix at 15a). Thereafter, Tri-State timely filed a petition for writ of certiorari in the Oklahoma Supreme Court. Certiorari was denied on March 12, 1990.[11] (Appendix at 17a).

REASONS FOR GRANTING CERTIORARI

The federal circuits are split, the federal circuits vary with state courts of last resort, and the state courts vary

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[10] The fact was not disputed that Boren was pursuing a personal endeavor at the time of the accident. Consequently, even if Boren had been Tri-State's agent or servant at that time, Tri-State would not be deemed liable under applicable Oklahoma law. *See, e.g., Ellis & Lewis, Inc. v. Trimble*, 177 Okla. 5, 57 P.2d 244 (1936); *Fairmont Creamery Co. of Lawton v. Carsten*, 175 Okla. 592, 55 P.2d 757 (1936). The affirmation of the district court was based exclusively on the appellate court's interpretation of 49 C.F.R. § 1057.12(c)(1) (1985) and two cases construing that regulation. Hence, the liability of Tri-State exists solely by virtue of a state court's interpretation of federal law.

[11] The Oklahoma supreme court's mandate permitting execution of the judgment against Tri-State was stayed on April 16, 1990, pending review of the case by this Honorable Court.

with each other over the interpretation of the federal statute and its companion regulation governing the use of non-owned equipment by carriers engaged in interstate commerce. As a result, federal law is being misinterpreted and unevenly applied. This has led to confusion and injustice.

The statute governing an authorized carrier's use of non-owned equipment is 49 U.S.C. § 11107 (1990) (formerly 49 U.S.C. § 304(e) (repealed October 17, 1978)). That statute was enacted after Congress recognized that certain trucking companies were attempting to circumvent the restrictions imposed upon their equipment and employees through the use of non-owned equipment and independent contractors. In some instances, authorized carriers used leased vehicles to avoid ICC safety regulations; in others, the use of leased vehicles was designed to avoid financial responsibility for accidents involving those vehicles. *See generally American Trucking Ass'ns v. United States*, 344 U.S. 298, 304-05 (1953); *Transamerican Fr. Lines v. Brada Miller Fr. Sys.*, 423 U.S. 28, 35-38 (1975).

To eliminate these abuses, Congress, in 1956, authorized the Commission to proscribe specific regulations governing the use of non-owned equipment by authorized carriers. Act of August 3, 1956, Ch. 928, Pub.L.No. 597, 1956 U.S. Code Cong. & Admin. News (70 Stat.) 1163 (codified as 49 U.S.C. § 304(e) (1956)). In practical effect, section 304(e) (now section 11107(a) (1990)) and its companion regulation (now 49 C.F.R. § 1057 (1990)) were designed to ensure that equipment leased by an authorized carrier was treated as if it was owned by

the carrier.[12] Consequently, an authorized carrier, such as Tri-State, is prohibited from disclaiming responsibility for the negligent use of leased equipment on the grounds that the person operating the equipment is an independent contractor. The regulations, however, have been interpreted inconsistently and the courts of this country have concomitantly split on the question of whether the regulations abrogate, modify or incorporate traditional common law notions of respondeat superior. As a result, the courts are now divided as to whether an authorized carrier can be liable in the absence of a finding that the operator's negligent conduct was somehow related to the carrier's authority to transport freight in interstate commerce, or otherwise occurred within the scope of employment, *i.e.*, in furtherance of the carrier's business.

In the midst of this conflicting authority, the Oklahoma court of appeals affirmed the entry of a judgment notwithstanding the verdict against Tri-State. Ignoring Oklahoma state law to the contrary, the court of appeals felt compelled to follow a Tenth Circuit opinion that analyzed carrier liability under 49 C.F.R. § 1057. In the process, however, the Oklahoma court further

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[12] Additionally, Congress has authorized the Commission to require an authorized carrier to identify the motor vehicles it leases for use in "transportation subject to [ICC] jurisdiction." 49 U.S.C. § 11106 (1990). The pertinent portions of both sections 11106 and 11107 are set forth in the Appendix, beginning at page 20a and all references herein are made to the 1990 version of these statutes since they have remained unchanged since 1985. Furthermore, the terms "authorized carrier," "equipment" and "lease" as used in this petition are defined in 49 C.F.R. § 1057.2 (1985).

expanded the regulatory effect of that regulation by holding that an authorized carrier is vicariously liable for the negligent use of the equipment it leases, even though the equipment was neither operated under the carrier's ICC authority, nor used in a manner that directly or indirectly furthered the carrier's business. No other court has interpreted the regulation so broadly.

As a party aggrieved by the selective interpretation of federal law undertaken by the Oklahoma court of appeals, Tri-State requests this Court to grant certiorari and subsequently resolve the conflicting interpretations to which 49 C.F.R. § 1057 has been subjected. Until such a determination is made, the application and effect of a federal law will not be uniformly interpreted and the trucking industry will continue to face intolerable uncertainty with respect to accidents involving the leased equipment on which it so heavily relies. Against this backdrop of conflict and misinterpretation, the Oklahoma court of appeals has ruled upon an important question of federal law that has not been, but should be, decided by this Honorable Court. For these reasons, Tri-State's petition for writ of certiorari should be granted.

1. The Applicable Statutes and Regulations have been Interpreted Contrary to Their Intended Purpose.

The statutory authority under which the Commission enacted its regulations governing the use of non-owned equipment by authorized carriers is set forth in 49 U.S.C.

§ 11107 (1990). Today, as well as at the time of the accident giving rise to the lawsuits below, that statute provided, in part, that the Commission may "require" an authorized carrier:

> [to] have control of and be responsible for operating [non-owned equipment] in compliance with requirements prescribed by the Secretary of Transportation on safety and operations and equipment, and with other applicable law *as if the [non-owned equipment was] owned by the [authorized carrier].*

49 U.S.C. § 11107(a)(4) (1990) (emphasis added).

The italicized language of section 11107(a)(4) noted above indicates an explicit congressional intention to require authorized carriers to contractually assume the same responsibility for the equipment they lease as for the equipment they own, nothing more. *See Transamerican Fr. Lines v. Brada Miller Fr. Sys.*, 423 U.S. 28, 39 (1975) (quoting *Lease and Interchange of Vehicles by Motor Carriers*, 52 M.C.C. 675, 681 (1951)). *A fortiori*, a person operating leased equipment *in an activity related to interstate commerce* is deemed to be the "statutory employee" of the authorized carrier-lessee, rather than an independent contractor. *See, e.g., Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1973).

Despite the congressional mandate in section 11107(a)(4) that the responsibility of authorized carriers using non-owned equipment is to be no greater than if the equipment was owned by the carrier, the Commission's regulation, in part, *appears* somewhat broader:

> (c) *Exclusive possession and responsibilities* – (1) The [written lease required to be executed by an authorized carrier with respect to the use of non-owned equipment] shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. *The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.*

49 C.F.R. § 1057.12(c)(1) (1985) (emphasis added).

Courts interpreting section 1057.12(c)(1) have widely split over the meaning and effect of the regulation's last sentence. Some courts have held that authorized carriers are liable for *all* acts that occur during the effective term of the carrier's lease, regardless of the use being made of the leased equipment at the time of the accident; others have refrained from imposing such expanded liability by viewing the leased equipment as if it was owned by the carriers and then determining whether liability would be imposed on the carrier if it owns the equipment (*e.g.*, by then determining liability under a traditional respondeat superior analysis).

It is apparent that this split in authority over the issue of carrier liability resulted from the emphasis courts have placed on the last sentence of what is today 49 C.F.R. § 1057.12(c)(1), rather than on the last phrase of 49 U.S.C § 11107. The Oklahoma court of appeals affirmed the judgment against Tri-State on the basis of this federal regulation, in effect holding that 49 C.F.R. § 1057.12(c)(1) (1985) abrogated the state law doctrine of respondeat superior by imposing liability for any act during the term of the lease, whether within the course of employment or

not. (Appendix at 4a). Contrary to the rebuttable presumption existing under Oklahoma state law, the district court and court of appeals felt constrained to follow the interpretation of the federal regulation given by its federal circuit in *Rodriguez*. Significantly, however, neither the Oklahoma court, nor the Tenth Circuit, nor any of the opinions on which that circuit relied, specifically determined that the negligent use of the leased equipment was substantially related to interstate commerce. Further, none of these opinions emphasized or even analyzed the limiting language contained in the statutory source of authority, 49 U.S.C. § 11107(a)(4) or its predecessor statute. See, e.g., *Rodriguez v. Ager*, 705 F.2d 1229, 1233-36 (10th Cir. 1983).

There is no suggestion that by authorizing the Commission to enact regulations governing the use and identification of non-owned equipment by authorized carriers, Congress intended that the Commission regulate *every* use of leased equipment or eliminate, *in toto*, the doctrine of respondeat superior by making authorized carriers strictly liable. Indeed, this Court stated as much in *Transamerican Fr. Lines v. Brada Miller Fr. Sys.*, wherein it was noted that the Commission's "responsibility-and-control regulations" require an authorized carrier to only "assume responsibility *for the shipment* and have full authority to control *it*." 423 U.S. 28, 36 (1975) (emphasis added). Further, in *American Trucking Ass'ns v. United States*, this Court recognized that the scope of the Commission's rule-making power, "conterminous with the scope of agency regulation itself," extends only to *"the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce* and to the

procurement of and provision of facilities for such transportation . . . . " 344 U.S. 307, 311 (1953) (emphasis added); *see* 49 U.S.C. § 10521(a) (1990) (ICC jurisdiction limited to interstate transportation);[13] 49 C.F.R. § 1057.1(a),.2(a),(b) and (e) (1985) (applicability of regulations limited to interstate use of leased equipment); *see also, e.g. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935) (power of Congress to control intrastate transactions on the ground that they affect interstate commerce is confined to transactions that directly affect interstate commerce). Nowhere has *49 U.S.C. § 11107* been interpreted to apply to situations where the negligent use of leased equipment occurred in an activity wholly disjoined from the commercial activities sought to be regulated by the ICC.

Thus, it appears that under the statute and its companion regulation, an authorized carrier should be deemed liable for the negligent operation of leased equipment *only* if there exists some nexus between: (i) the use being made of the leased equipment at the time the negligent conduct occurs; and (ii) the carrier's ICC operating authority. If such a connection exists, then the operator of the leased equipment should be regarded as an "employee" of the authorized carrier and the doctrine of respondeat superior is then applied to determine whether the "employee's" negligence occurred within the scope of employment.

Despite the limitation on ICC jurisdiction and the clear intent of the statute, the various courts'

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[13] The pertinent provisions of section 10521 are contained in the Appendix at 19a.

interpretations of 49 U.S.C. § 11107(a)(4) and 49 C.F.R. § 1057(c)(1) are at extreme variance. *Compare, e.g., Rodriguez,* 705 F.2d at 1237 (common law doctrine of respondeat superior abrogated by regulations) *with Gudgel v. Southern Shippers, Inc.,* 387 F.2d 723, 725-26 (7th Cir. 1967) (common law doctrine of respondeat superior incorporated by regulations) *and Mellon National Bank & Trust Co. v. Sophie Lines, Inc.,* 289 F.2d 473, 477 (3d Cir. 1961) (common law doctrine of respondeat superior modified by regulations). Guidance is needed to eliminate the existing confusion as to the scope and effect of 49 C.F.R. § 1057 (1990).

2. The United States Courts of Appeals are Rendering Conflicting Opinions as to the Effect of 49 C.F.R. § 1057.

In affirming the lower court's judgment against Tri-State, the Oklahoma court of appeals primarily relied on *Rodriguez v. Ager,* 705 F.2d 1229 (10th Cir. 1983). That Tenth Circuit opinion, however, conflicts with certain opinions emanating from the Third, Sixth and Seventh Circuits. The strikingly similar facts in these cases accentuate the disparity in the courts' interpretation of federal law.

In *Rodriguez,* the owner of a truck leased to an authorized carrier arranged to have his brother drive the truck from South Dakota to Wyoming in order to transport a load of wool. *Id.* at 1230. The authorized carrier was not aware that the truck was being used in this manner. *Id.* at 1231. En route to Wyoming, the brother was involved in an accident. *Id.* at 1230. At the time of the accident, the lease between the owner and the authorized carrier was

presumptively in effect and the carrier's decals and ICC certificate number were displayed on the truck. *Id.* On these facts, the Tenth Circuit held that under 49 C.F.R. § 1057.4 (now § 1057.12), the authorized carrier was liable since the accident occurred during the effective term of the carrier's lease, notwithstanding the fact that the driver of the truck was on a mission for someone other than the carrier, and even though the carrier was unaware that the truck was being used for that purpose. *Id.* at 1231, 1237.[14]

Contrasted to the holding in *Rodriguez* is *Gudgel v. Southern Shippers, Inc.*, in which the driver of a leased vehicle was also involved in an accident while making an intrastate trip on behalf of someone other than the authorized carrier-lessee. 387 F.2d at 726-27 (7th Cir. 1967). Although the effectiveness of the lease between the authorized carrier and the owner of the vehicle was disputed, the lease, by its terms, was in effect on the date of the accident. *Id.* In finding that the authorized carrier was

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[14] Cases seemingly consistent with *Rodriguez* are *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984); *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973) and *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974). Like the Tenth Circuit, the courts in these cases held that the common law doctrine of respondeat superior is not applicable in determining whether an authorized carrier is liable for the negligent operation of the equipment it leases so long as the equipment is being used in an activity related to interstate commerce. *See also Ronish v. St. Louis*, 621 F.2d 949, 951 (9th Cir. 1980); *Judy v. Tri-State Motor Transit Co.*, 844 F.2d 1496, 1501 (11th Cir. 1988); *cf. Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (4th Cir. 1979); (issue of whether the regulations actually preempt state common law was not addressed).

not liable to the plaintiffs who had filed suit as a result of the accident, the Seventh Circuit stated that an authorized carrier is only liable for the negligence of an independent contractor operating equipment leased to the carrier, "if the contractor is operating by authority of the carrier's I.C.C. certificate *and is carrying out the carrier's undertaking.*" 387 F.2d at 725 (emphasis added) (citing *Mellon Nat'l Bank & Truck Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961) and Restatement of Torts § 428); *see also Vance Trucking Company v. Canal Ins. Company*, 249 F.Supp 33 (D.S.C. 1966), *aff'd*, 395 F.2d 391 (4th Cir.), *cert. denied*, 393 U.S. 845 (1968) (applying doctrine of respondeat superior despite existence of effective lease); *cf. Pace v. Southern Express Company*, 409 F.2d 331 (7th Cir. 1969) (decision under Indiana intrastate regulations). Directly contrary to the Tenth Circuit, the Seventh Circuit expressly stated that the existence of an effective lease only "supports a weak inference that the tractor was being operated under [the authorized carrier's] control and in its business when the collision occurred." *Gudgel*, 387 F.2d at 726-27.

Wilcox v. Transamerican Freight Lines, Inc., 371 F.2d 403 (6th Cir. 1967) is another case reflecting the conflict in which the circuit courts are involved. In *Wilcox*, the Sixth Circuit determined that "the I.C.C. Regulations do not impose a liability on a carrier using leased equipment greater than that when operating its own equipment." *Id.* at 404. Recognizing that if an authorized carrier's employee used a carrier-owned vehicle for a peculiarly personal purpose, the carrier could not be held liable for the employee's negligence under state law, the court stated that "[t]he same rule applies to leased equipment."

Id. (citing *Kaplan Trucking Company v. Lavine*, 253 F.2d 254 (6th Cir. 1958)).[15] Consequently, the court in *Wilcox* exonerated the authorized carrier from liability when it found that the negligent use of the vehicle leased by the carrier occurred outside the scope of employment. *Id.* at 405; *cf. Leach v. Newport Yellow Cab, Inc.*, 628 F.Supp 293 (S.D. Ohio 1985) (accident involving railroad).

Although the opinions of *Gudgel* and *Wilcox* have been questioned by some courts, the Third Circuit's opinion in *Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961) is one on which the courts (both state and federal) extensively rely. *See, e.g., Rodriguez*, 705 F.2d at 1233; *Gudgel*, 387 F.2d at 725.

The facts of *Mellon* are also "substantially similar" to those in *Rodriguez*. In *Mellon*, the Third Circuit held that there was a "conclusive presumption" that the driver of a truck leased by an authorized carrier *was operating the truck within the scope of employment when the driver was transporting freight for another.* 289 F.2d at 477; *see also Schedler v. Rowley Interstate Transp. Co.*, 68 Ill.2d 7, ___, 368 N.E.2d 1287, 1289-92 (1977) (Ryan J., dissenting). In ruling as it did, the court specifically stated: "It was [the authorized carrier's] conduct which allowed the truck to make the trip into Pennsylvania with its decals and its lease."

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[15] In *Kaplan*, the Sixth Circuit held on the basis of facts nearly identical to those presented in *Rodriguez* that an authorized carrier could not be held liable for the negligent use of leased equipment unless the driver of the equipment, at the time of the negligent conduct, was acting within the scope of employment. 753 F.2d at 257 (citing *Simon v. McCullough*, 155 Ohio St. 104, 98 N.E.2d 19 (1951)).

Mellon, 289 F.2d at 477. Further, the court stated that if a "thief" had stolen the leased vehicle and used it on a personal mission, "there would be no conclusive presumption that the truck was on [the carrier's] business." *Id.* Consequently, the opinion in *Mellon* recognizes that the Commission's regulations do not entirely preempt the state law doctrine of respondeat superior. Therefore, consistent with the congressional mandate contained in 49 U.S.C. § 11107(a)(4), as well as the common law, *Mellon* supports the conclusion that an authorized carrier should not be presumed liable if the negligent use of leased equipment occurs outside the scope of the operator's employment, *i.e.*, in an activity completely disconnected with interstate commerce. *See Schedler*, 68 Ill.2d at ___, 368 N.E.2d at 1291 (Ryan, J., dissenting).

As stated, both *Rodriguez* and *Gudgel* relied on *Mellon* in reaching their respective conclusions. The fact that two different circuit courts are relying on the same case to reach directly opposite results illustrates the confusion in this area and clearly indicates that the circuit courts are in need of guidance.

3. The United States Courts of Appeals are Rendering Opinions that Conflict with the Opinions of State Courts of Last Resort.

The Tenth Circuit's holding in *Rodriguez* additionally conflicts with the opinions of many state courts of last resort. In *Cox v. Bond Transportation, Inc.*, for example, the owner-operator of a truck leased to an authorized carrier began driving the truck from the carrier's terminal to his home after he discovered that his personal truck would

not start. 53 N.J. 186, ___, 249 A.2d 579, 583 (1969). En route, the owner-operator was involved in a collision with two other vehicles and he, as well as the authorized carrier, were sued. *Id.* at ___, 249 A.2d at 584. Like the leased truck in *Rodriguez*, the truck in *Cox* displayed the authorized carrier's logo and certificate number at the time of the accident. *Id.* at ___, 249 A.2d at 583-84. Although the New Jersey supreme court determined that the authorized carrier in *Cox* was liable under the Commission's regulations, the court did so only after finding that the owner-operator of the leased vehicle was operating the leased truck "with the knowledge and for the benefit of the carrier." *Id.* at ___, 249 A.2d at 589-90. The fact that the authorized carrier's decals were displayed on the leased truck was viewed by the supreme court as creating a strong, but not conclusive, presumption that the truck was engaged in the activities of the carrier. *See id.* at ___, 249 A.2d at 589. Thus, the decision of the New Jersey supreme court in *Cox*, as with *Mellon*, demonstrates that the Commission has not preempted the doctrine of respondeat superior.[16] For this reason, the opinion in *Cox* directly conflicts with *Rodriguez*.

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[16] Cases seemingly consistent with *Cox* in requiring that the use must be for the benefit of the carrier are *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968) and *Gackstetter v. Dart Transit Co.*, 269 Minn. 146, 130 N.W.2d 326 (1964). In these cases, the respective state courts of last resort held that the Commission's regulations do not completely abrogate the doctrine of respondeat superior and that carrier liability will therefore attach only when the negligent use of the equipment leased by the authorized carrier occurred in the scope of employment.

4. The State Courts of Last Resort are Rendering Conflicting Opinions.

As with the conflict among the federal circuits, the state courts of last resort have found that the issue of carrier liability under the Commission's regulations is not easily resolved. In *Schedler v. Rowley Transp. Co.*, 68 Ill.2d 7, 368 N.E.2d 1287 (1977), for example, the Illinois Supreme Court, relying on *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973) and, significantly, *Mellon Nat'l Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961), opined that: "it was the purpose of the regulatory scheme that the carrier-lessee be vicariously responsible to the public for the negligent operation of the leased vehicle without regard to whether at the time in question it was being used in the business of the lessee." *Id.* at ___, 368 N.E.2d at 1289. Consequently, the Illinois supreme court found that the defendant carrier was liable for the negligence of an owner-operator who was driving a leased vehicle to his home.[17] *Id.; see also Weeks v. Merrill Transport Co.*, 377 A.2d 444 (Me. 1977); *cf. Hershberger v. Home Transport Co.*, 103 Ill. App. 3d 348, 431 N.E.2d 72 (1982) (conduct of driver giving rise to injury must have nexus with interstate commerce).

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[17] In a strong dissent, Justice Ryan, among other things, criticized the majority view stating that there was nothing in either *Mellon* or *Simmons* which "supports the contention that an effectual leasing arrangement imposes liability upon the [carrier] lessee regardless of whether at the time of a driver's negligent conduct the vehicle in question is being used in the business of the lessee." *Id. at* ___, 368 N.E.2d at 1291. Justice Ryan further considered the limiting language in what is now 49 U.S.C. § 11107(a)(4) and stated that the "presence of the carrier's legend on the vehicle at the time of the accident" did not create an irrebuttable presumption that the vehicle was being used in furtherance of the carrier's business. *Id.*

The facts of *Schedler* are indistinguishable from those involved in *Cox* and each case relied on *Mellon*. The holdings of these cases, however, are inconsistent due to what each court viewed to be the proper interpretation of federal law. Accordingly, the state courts of last resort are likewise in need of this Honorable Court's guidance.

5. The Court of Appeals for the State of Oklahoma Decided an Important Federal Question that has not been, but should be, decided by this Court.

Against this backdrop of confusion and uncertainty, the Oklahoma court of appeals determined that by using leased equipment, Tri-State was liable for Boren's negligence, notwithstanding the fact that liability would not have been imposed under Oklahoma law. In ruling as it did, the Oklahoma court of appeals expanded the regulatory effect of the Commission's responsibility-and-control regulations far beyond the permissible scope of congressional authority granted by 49 U.S.C. § 11107 (1990) and addressed by this Court in *American Trucking* and *Brada Miller*.[18] Indeed, the Oklahoma court of appeals found

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[18] Even in *Rodriguez v. Ager*, the opinion on which the Oklahoma court of appeals primarily relied, the negligent use of the leased vehicle occurred while the vehicle was being used under ICC authority to transport a load of wool. 705 F.2d 1229, 1230 (10th Cir. 1983). Thus, the negligent conduct for which the authorized carrier was found liable occurred while the leased vehicle was being operated under the carrier's interstate authority. Further, in every case on which the Tenth Circuit in *Rodriguez* primarily relied, the negligent use of the leased vehicle occurred while the vehicle

(Continued on following page)

that Tri-State was liable for Boren's negligence even though Boren, at the time of the accident, was using his truck for a purpose completely unrelated to the transportation of freight and wholly divorced from Tri-State's authority to engage in interstate commerce.

By affirming the lower court's judgment against Tri-State, the Oklahoma court effectively construed 49 C.F.R. § 1057 as making Tri-State "more" liable for the equipment it *leases* than it is with respect to the equipment it *owns*. If Boren had been using a truck *owned* by Tri-State at the time the accident occurred, Tri-State would not have been found liable under applicable Oklahoma law. Although Boren would be presumed to be acting within the scope of employment if driving a truck owned by Tri-State, that presumption would be rebuttable. (*Supra* note 10). Because Boren was driving a truck *leased* by Tri-State, however, the company was found liable. Such a result clearly cuts against intended effect of 49 U.S.C. § 11107 and its companion regulation.

Because Tri-State, like many other trucking companies, employs a substantial number of leased vehicles to meet the fluctuating demands of its business, the financial exposure to Tri-State, and the trucking industry as a whole, is dramatically increased. The owner-lessors

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(Continued from previous page)

was being used to transport freight under the carrier's ICC authority. See *Id.* at 1233-36. In the present case, however, Tri-State's interstate authority was not needed for Boren to drive his truck less than a mile to a local restaurant, the same being authorized by Boren's Oklahoma operator's permit. *Cf. Simon v. McCullough Transfer Co., Inc.*, 155 Ohio St. 104, 98 N.E.2d 19 (1951) (carrier's operating authority viewed as unnecessary when driver of leased equipment was not transporting freight).

of the leased equipment typically retain physical possession of their property and may properly enter into multiple leasing arrangements with more than one carrier. Accordingly, Tri-State has an opportunity to inspect the condition of the leased equipment only when it enters a Tri-State terminal for dispatching (as is anticipated and required by ICC regulations). Consequently, if this current interpretation of the Commission's regulations governing the use of non-owned equipment by authorized carriers continues, trucking companies may find it inadvisable to use leased vehicles in their fleets.

Ironically, the trucking and insurance industries have for years recognized that leased vehicles are not always engaged in activities that further the carrier's business. In those instances where a driver is on a personal mission, the insurance coverage under the general liability policy (covering acts in furtherance of a carrier's business) is denied. Therefore, in addition to the general liability policy, carriers generally purchase "bob-tail" insurance to cover the leased drivers and vehicles when they are not engaged in the carrier's business.[19]

In this case, Tri-State had both types of policies in effect at the time of the accident. However, if the Oklahoma "continuous liability" holding is adopted, the bob-tail policy is superfluous as the carrier is always liable for any vehicle under lease, whether or not the vehicle is being used in furtherance of the carrier's

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[19] In fact, 49 C.F.R. § 1057 contemplates this non-carrier oriented usage when it states that "[t]he lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance." 49 C.F.R. § 1057.12(j) (1990).

business. Nevertheless, both policies are still necessary to cover leased drivers and equipment when they are not furthering the carrier's business. In these situations, coverage is usually denied under the terms of a general liability policy. This is an important consideration as a substantial portion of Tri-State's liability and bob-tail insurance is self-insured.

CONCLUSION

Federal laws should be consistently applied. *See generally Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 596 (1923). 49 U.S.C. § 11107 and 49 C.F.R. § 1057 have not been. As illustrated above, the courts of this country are divided over the question presented by this petition. This dissention is caused by at least three different interpretations that are being given to the federal statute and regulation governing the use of leased equipment by authorized carriers.

The first interpretation holds that the doctrine of respondeat superior has been superseded by the Commission's regulations. Under this view, authorized carriers are found liable every time leased equipment is negligently operated during the effective term of the lease, notwithstanding the use being made of the equipment at the time the negligent conduct occurs.

The second interpretation holds that the doctrine of respondeat superior has been modified by the Commission's regulations. Under this view, authorized carriers are found liable only if leased equipment is being used in commercial activities sought to be governed by the ICC, in which case

the person operating the equipment is deemed to be acting within the scope of employment.

The third interpretation holds that the doctrine of respondeat superior has been incorporated by the Commission's regulations. Under this view, authorized carriers are liable only if: (i) the leased equipment is being used in commercial activities sought to be governed by the ICC and (ii) the operator is acting within the scope of his employment with the carrier that leased the equipment.

By electing to follow the first of the three different interpretations set forth above, the Oklahoma court of appeals decided an important question of federal law that is, at best, surrounded by uncertainty and confusion. Although Petitioner believes the third interpretation to be the correct one, obviously all cannot be.

A driver negligently operating a leased vehicle involved in an accident while on a personal mission in Oklahoma would result in carrier liability; an identical accident with suit filed in the Missouri or New Jersey courts would not. Similarly, a suit against a driver while under lease to Carrier A, hauling for Carrier B, necessarily results in carrier liability in the Tenth Circuit, but not the Sixth or Seventh Circuits. These and other similar discrepancies all arise from interpretations of the same law. This is not equitable or consistent.

In light of the vast financial exposure to which authorized carriers using leased equipment are exposed as a result of holdings similar to that of the Oklahoma court of appeals, the question presented by the instant case and the differing interpretations given to 49 U.S.C. § 11107 and 49 C.F.R. § 1057 should be resolved by this Honorable Court.

Accordingly, Petitioner believes that the instant case presents an ideal mechanism by which this Court can resolve the existing dispute over the interpretation of a federal law. Therefore, Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,	)	No. 69,814
Appellees,	)	NOT FOR PUBLICATION
vs.	)	
ELVIS D. BOREN and TRI-STATE MOTOR TRANSIT COMPANY,	)	
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

Honorable Steven J. Adams, Trial Judge

C. Clay Roberts III Richard D. Marrs Joe M. Fears Tulsa, Oklahoma	For Appellees Laura Atkinson and Janell Renae Jones
Thomas Jot Hartley William H. Castor Rorschach, Pitcher, Castor, Hartley & Jones Vinita, Oklahoma	For Appellee Patty Jones, individually and as surviving spouse of Wayman Jones, deceased
Donald Church Tulsa, Oklahoma	For Appellant Tri-State Motor Transit Company

MEMORANDUM OPINION

BACON, J.

This is an appeal from an order of the trial court granting the appellees' motion for a judgment notwithstanding the verdict that appellant, Tri-State Motor Transit, lessee of a truck owned by Boren, was vicariously liable for the negligent acts of the lessor, Boren, even though he was not on a mission for Tri-State.

Boren leased his truck and trailer to Tri-State on August 27, 1984, under a "Hot Shot" contract. Tri-State was licensed by the Interstate Commerce Commission and was subject to ICC regulations as lessee.

On the evening of November 29, 1985, Boren, who was in Talala, Rogers County, Oklahoma, drove the truck, without the trailer, to the Burger Hut for food. It was raining and dark when Boren, driving north on U.S. Highway 169, approached the Burger Hut. He stopped to permit a vehicle southbound on the same highway to pass so he could turn left into the Burger Hut parking lot. The vehicle proceeding south was driven by Janell Jones, who had as passengers Patty and Wayman Jones, husband and wife, and Laura Atkinson.

At the same time, a car driven by William Marlin was proceeding north on U.S. Highway 169 in the same direction as Boren. Marlin failed to see Boren until he was right on top of him, and Marlin swerved to his left to avoid hitting Boren's truck. In doing so, he collided head-on with the vehicle driven by Janell Jones. As a result of this collision, Wayman Jones died and Patty Jones, Janell Jones and Laura Atkinson suffered extensive personal injuries.

It is uncontroverted that at the time of the accident the tail lights and the left turn signal on the truck were

not in working order, that the "Hot Shot" lease was in full force and effect, and that Tri-State's logo and ICC permit numbers were displayed on the truck.

Two lawsuits were filed by appellees, plaintiffs below, for wrongful death and personal injuries. These were consolidated for purposes of trial. At the conclusion of all the evidence, plaintiffs moved for a directed verdict against Tri-State on the basis that Tri-State, as a matter of law, was vicariously liable based on Boren's negligence. The trial court overruled this motion and the case was submitted to the jury.

The jury returned a verdict that Boren was 70 percent negligent, Marlin 30 percent negligent, and no negligence was attributable to Tri-State. A timely motion was filed by the plaintiffs for a judgment notwithstanding the verdict against Tri-State to hold it vicariously liable for Boren's 70 percent negligence. The trial court sustained this motion, from which Tri-State lodges this appeal.

Tri-State's appeal is premised on two allegations of error. First, that the trial court erred in granting the motion for judgment notwithstanding the verdict; and second, that the trial court erred in overruling Tri-State's motion for directed verdict in that at the time of the accident Boren was not on a mission for Tri-State, the lessee.

In Rodriguez v. Ager, 705 F.2d 1229 (10th Cir. 1983), the court held, in an almost identical factual situation, that under Interstate Commerce Commission regulations the carrier lessee was liable as a matter of law for injuries resulting from a head-on collision between an automobile

and truck leased by the carrier even though the truck driver was not on a mission for the carrier.

49 C.F.R. § 1057.12(c)(1)(1984) provides:

> The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

The court in Rodriguez, 705 F.2d at 1235, held that section 1057.12(c)(1), formerly 49 C.F.R. § 1057.4(a)(4), abolished the independent contractor status from lease arrangements and relegated to the carrier lessee full responsibility for the negligence of the driver regardless of whether or not the driver is on a mission for the carrier lessee.

The facts are not in dispute that at the time of the collision the truck was under lease to the carrier, Tri-State, and that Tri-State's insignia and ICC number were displayed on the truck.

The trial court correctly sustained appellees' motion for judgment notwithstanding the verdict. Tri-State would be vicariously liable to third parties for loss of life or injuries from operation of the truck under the ICC regulations. Rodriquez [sic] v. Ager, supra; McLean Trucking Co. v. Occidental Fire & Cas. Co. 324 S.E.2d 633 (N.C. App. 1985).

The judgment of the trial court in overruling Tri-State's motion for a directed verdict and sustaining appellees' motion for judgment notwithstanding the verdict is AFFIRMED.

MEANS, P.J., and RAPP, J., concur.

IN THE DISTRICT COURT IN AND FOR
ROGERS COUNTY, STATE OF OKLAHOMA

LAURA ATKINSON, Plaintiff, vs. WILLIAM JACK MARLIN; ELVIS D. BOREN; FRANCES KELLEY and TRI-STATE MOTOR TRANSIT COMPANY, a foreign corporation, Defendants.	)	No. C-86-56
PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased; and JANELL RENAE JONES, Plaintiffs, vs. TRI-STATE MOTOR TRANSIT COMPANY; PROTECTIVE INSURANCE COMPANY; ELVIS D. BOREN; WILLIAM JACK MARLIN; and FRANCES F. KELLEY, Defendants.	)	No. C-86-267

JOURNAL ENTRY OF JUDGMENT ON VERDICT

This matter came on before me, the undersigned Judge of the District Court of Rogers County, State of Oklahoma, on the 22nd day of June, 1987, pursuant to regular assignment. The Plaintiffs, Laura Atkinson and Janell Jones, appeared in person and by their counsel, C. Clay Roberts III, Richard D. Marrs and Timothy S. Gilpin

of Marsh & Armstrong; the Plaintiff Patty Jones, in her individual capacity and as surviving spouse of Wayman Jones, appeared in person and by her counsel, Jot Hartley and Bill Caster [sic]; the Defendants, William Jack Marlin and Frances Kelley, now Benson, appeared in person and by their counsel, John Gladd; the Defendant Elvis D. Boren appeared in person and by his counsel, Roger R. Williams; and the Defendant Tri-State Motor Transit Co. appeared by its representative, James Wingfield, and was represented by its counsel, Donald Church. All parties announced ready for trial.

A jury of twelve men and women were duly empaneled and sworn to try the above-styled cause of action.

On June 22, 1987, through June 26, 1987, this matter came on for trial; the jury being present in open Court and appearance by the parties as set forth above. Opening statements were made by all counsel concerned. The Plaintiffs introduced evidence in support of their Petitions. In addition, on June 25, 1987, the Defendant, Frances Kelley, now Benson, demurred to the evidence and moved the Court to be dismissed. This demurrer of the Defendant Kelley, now Benson, was sustained by the Court. Thereon the Defendants, William Jack Marlin, Elvis D. Boren and Tri-State Motor Transit Company, demurred to the Plaintiff's evidence and moved to be dismissed from the lawsuit. The demurrers of the Defendants Marlin, Boren and Tri-State were overruled by the Court.

Thereafter the Defendant Marlin introduced evidence in support of his answer and rested. Thereupon the Defendants, Boren and Tri-State Motor Transit Company, presented evidence in support of their Answers and rested. At this juncture the Defendants, Marlin, Boren and Tri-State each moved for directed verdicts against the Plaintiffs. These motions for directed verdicts by the Defendants, Marlin, Boren and Tri-State Motor Transit Company were overruled by the Court.

Thereafter the Plaintiffs moved for a directed verdict against the Defendant, Tri-State Motor Transit Company and Elvis D. Boren as to the issue of liability. This motion was overruled.

On June 26, 1987, this Cause of action came on for further trial. Thereupon the Court read the statement of the case, instructions to the jury, and counsel for the parties presented their closing arguments. Thereafter the jury retired to deliberate. The jury later returned with its verdict to be read in open Court. The jury returned a "White Verdict Form, Multiple Defendants, Plaintiffs Not Negligent" stating in part:

> "We, the jury, empaneled and sworn in the above entitled cause, do, upon oaths, find as follows:
>
> 1. Plaintiffs Janell Renae Jones, Laura Atkinson, and Patty Jones, Individually and as surviving Spouse of Wayman Jones, deceased, contributory negligence – 0%
>
> 2. Defendant William Jack Marlin's negligence – 30%
>
> 3. Defendant Elvis D. Boren's negligence – 70%

4. Defendant Tri-State Motor Transit Co.'s negligence – 0%

signed by ten jurors."

The jury returned its verdict on the Blue Verdict Form in open Court stating in part:

"We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the issues in favor of the Plaintiff, Janell Renae Jones, and fix the dollar amount of her damages in the sum of $800,000.00.

signed by K. Don Morgan, Foreman"

The jury returned its verdict on the Blue Verdict form in open Court stating in part:

"We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the issues in favor of the Plaintiff, Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, and fix the dollar amount of her damages in the sum of $800,000.00.

signed by K. Don Morgan, Foreman"

The jury returned its verdict in open Court on the Blue Verdict Form stating in part:

"We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the issues in favor of the Plaintiff, Laura Atkinson, and fix the dollar amount of her damages in the sum of $70,000.00.

signed by K. Don Morgan, Foreman"

Polling of the jury was waived by all parties and the Court received the verdicts, and after concluding they were in proper form, directed that they be filed of record in the case. Thereupon the Plaintiffs moved for directed

verdict and for judgment notwithstanding the verdict against Tri-State Motor Transit Company. The Court overruled these Motions and directed that in the event the Plaintiffs desired to pursue these Motions that they be made at a later date and be accompanied with written briefs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Janell Renae Jones have and recover, jointly and severally, from the Defendants, William Jack Marlin, Elvis D. Boren, Tri-State Motor Transit Company and Protective Insurance Company, the principal sum of $800,000.00, prejudgment interest from time of filing to date of verdict (June 22, 1987) in the amount of $89,031.15, plus post judgment interest in addition to the prejudgment interest awarded, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, have and recover, jointly and severally, from the Defendants, William Jack Marlin, Elvis D. Boren and Tri-State Motor Transit Company, the principal sum of $800,000.00, prejudgment interest from time of filing to date of verdict (June 22, 1987) in the amount of $89,031.15, plus post judgment interest in addition to the prejudgment interest awarded, and the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff Laura Atkinson have and recover, jointly and severally, from the Defendants, William Jack Marlin, Elvis D. Boren and Tri-State

Motor Transit Company, the principle sum of $70,000.00, prejudgment interest from time of filing to date of verdict (June 22, 1987) in the amount of $9,773.92, plus post judgment interest in addition to the prejudgment interest awarded, and the costs of this action.

/s/ Steven J. Adams
Steven J. Adams
Rogers County District Judge

IN THE DISTRICT COURT IN AND FOR
ROGERS COUNTY, STATE OF OKLAHOMA

LAURA ATKINSON, Plaintiff, vs. WILLIAM JACK MARLIN; ELVIS D. BOREN; FRANCES KELLEY and TRI-STATE MOTOR TRANSIT COMPANY, a foreign corporation, Defendants.	)	Case No. C-86-56
PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased; and JANELL RENAE JONES, Plaintiffs, vs. TRI-STATE MOTOR TRANSIT COMPANY; PROTECTIVE INSURANCE COMPANY; ELVIS D. BOREN; WILLIAM JACK MARLIN; and FRANCES F. KELLEY, Defendants.	)	Case No. C-86-267

ORDER RULING ON MOTIONS

On this 6th day of October, 1987, the undersigned Judge of the District Court and Trial Judge in this case reviewed in chambers the Motion for New Trial filed by Defendant, Elvis D. Boren, the Motion to Settle Judgment on the Verdict, Motion for New Trial, and Motion for

Judgment Notwithstanding the Verdict filed by the Plaintiff, Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, and Plaintiffs, Janell Renae Jones and Laura Atkinson, and the pleadings filed in response to these various motions. Having examined the pleadings on file herein, the Court enters the order set forth as follows:

The Motion for New Trial of Defendant, Elvis D. Boren, is hereby OVERRULED.

The Motion for New Trial of Plaintiff, Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, and Plaintiffs, Janell Renae Jones and Laura Atkinson is hereby OVERRULED.

The Motion for Judgment Notwithstanding the Verdict of Plaintiff, Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, and Plaintiffs, Janell Renae Jones and Laura Atkinson, is hereby SUSTAINED.

The Motion to Settle Judgment of Plaintiff, Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, and Plaintiffs, Janell Renae Jones and Laura Atkinson is hereby SUSTAINED and judgment is hereby entered in favor of all Plaintiffs and against the Defendant William Jack Marlin and the Defendant, Tri-State Motor Transit company, and the Court finds the Defendant William Jack Marlin to be 30% negligent and the Defendant Tri-State Motor Transit Company to be 70% negligent due to it being vicariously liable for the negligence attributable to the Defendant, Elvis D. Boren.

Exceptions to the Court's ruling are noted on behalf of all parties.

/s/ Steven J. Adams
STEVEN J. ADAMS
District Judge

IN THE COURT OF APPEALS, DIVISION 2
STATE OF OKLAHOMA

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

69,814 LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMON [sic] JONES, deceased, and JANELL RENAE JONES, Appellees, v. ELVIS D. BOREN and TRI-STATE MOTOR TRANSIT COMPANY, Appellants.

Appellant's Petition for Rehearing is denied.

70,003 JOHN WAYNE MILLER, Appellee, v. OKLAHOMA STATE EMPLOYEES GROUP HEALTH, DENTAL AND LIFE INSURANCE BOARD, Appellant.

Appellant's Petition for Rehearing is denied.

70,079 GENERAL SUPPLY COMPANY, Appellee, v. PINNACLE DRILLING FLUIDS, INC., and CRAIG CARTER, Defendants, and STILLWATER NATIONAL BANK AND TRUST COMPANY, Appellant.

Appellee's Petition for Rehearing is denied.

71,496 STATE OF OKLAHOMA ex rel. COMMISSIONERS OF THE LAND OFFICE, Appellant, v. CITY OF STILLWATER, a municipality, and STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION, Appellees.

Appellant's Petition for Rehearing is denied.

Done in conference this 20th day of October, 1989.

/s/ William W. Means
WILLIAM W. MEANS
Presiding Judge
Court of Appeals, Division 2

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,	)	No. 69,814
Appellees,	)	
v.	)	
ELVIS D. BOREN, and TRI-STATE MOTOR TRANSIT COMPANY,	)	
Appellants.	)	

ORDER

Certiorari denied.

By unpublished opinion of the court of Appeals dated September 5, 1989, the judgment from which this appeal is taken was affirmed, and certiorari is herein denied by this Court. Pursuant to the Rules of the Supreme Court of Oklahoma, 12 O.S., Ch. 15, App. 1, Rule 31, the appellees have sought judgment against the surety on the supersedeas bond.

The judgment of the trial court was superseded by a bond in which the appellants, Tri-State Motor Transit Company and Protective Insurance Company, are the principals and the Fidelity and Deposit Company of Maryland is the surety. The conditions of the bond have become obligatory.

NOW, THEREFORE, the appellees are granted judgment against Fidelity and Deposit Company of Maryland in the whole amount of the judgment, together with

interest and costs, herein and below, but not to exceed the penal sum of the bond which is $1,677,120.00. Execution may issue hereon in the trial court, after this Court's mandate is there spread of record.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 12TH DAY OF MARCH, 1990.

/s/ Hargrave
CHIEF JUSTICE

Hargrave, C.J., Opala, V.C.J., Hodges, Lavender, Simms, Doolin, Wilson, JJ. – concur
Summers, J. – dissents.

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier–

(1) between a place in–

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not–

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier. . . .

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-296, § 31(b), July 1, 1980, 94 Stat. 824; Pub.L. 97-261, § 6(f), Sept. 20, 1982, 96 Stat. 1107; Pub.L. 99-521, § 6(a), Oct. 22, 1986, 100 Stat. 2994.)

§ 11106. Identification of motor vehicles

(a) The Interstate Commerce Commission may–

(1) issue and require the display of an identification plate on a motor vehicle used in transportation subject to its jurisdiction under subchapter II of chapter 105 of this title; and

(2) require the carrier to pay the reasonable cost of the plate.

(b) A carrier may use an identification plate only as authorized by the Commission.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1420.)

§ 11107. Leased motor vehicles

(a) Except as provided in section 11101(c) of this title, the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title that uses motor vehicles not owned by it to transport property under an arrangement with another party to–

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

(b) The Commission shall require, by regulation, that any arrangement, between a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and any other person, under which such other person is to provide any portion of such transportation by a motor vehicle not owned by the carrier shall specify, in writing, who is responsible for loading and unloading the property onto and from the motor vehicle.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1420; Pub.L. 96-296, § 15(d), July 1, 1980, 94 Stat. 809.)

PART 1057 – LEASE AND INTERCHANGE OF VEHICLES

* * *

AUTHORITY: 49 U.S.C. 304(e) and (f) and 5 U.S.C. 552, 553, and 559, unless otherwise noted.

SOURCE: 44 FR 4681, Jan. 23, 1979, unless otherwise noted.

§ 1057.1 Applicability.

The regulations in this part apply to the following actions by motor carriers holding permanent or temporary operating authority from the Commission to transport property:

> (a) The leasing of equipment with which to perform transportation regulated by the Commission. . . .

§ 1057.2 Definitions.

(a) *Authorized carrier* – A person or persons authorized to engage in the transportation of property as a common or contract carrier under the provisions of 49 U.S.C. 10921, 10922, 10923, 10928, 10931, or 10932.

(b) *Equipment* – A motor vehicle, straight truck, tractor, semitrailer, full trailer, any combination of these and any other type of equipment used by authorized carriers in the transportation of property for hire . . .

(d) *Owner* – A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person.

(e) *Lease* – A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation. . . .

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47850, Dec. 7, 1984]

§ 1057.11 General leasing requirements.

Other than through the interchange of equipment as set forth in § 1057.31, and under the exemptions set forth in Subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) *Lease* – There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

(b) *Receipts for equipment* – Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) *Identification of equipment* – The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows.

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in

Part 1058 of this chapter (Identification of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative. . . .

[44 FR 4681, Jan. 23, 1979, as amended at 49 FR 47269, Dec. 3, 1984; 49 FR 47850, Dec. 7, 1984; 50 FR 24649, June 12, 1985]

§ 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) *Parties* – The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) *Duration to be specific* – The lease shall specify the time and date or the circumstances on which the lease

begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c) *Exclusive possession and responsibilities* – (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease . . .

(j) *Insurance* – (1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor . . .

(l) *Copies of the lease.* – An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 1057.11(c)(2) is

carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease . . .

(49 U.S.C. 10321, and 11107; 5 U.S.C. 553)

[44 FR 4681, Jan. 23, 1979, as amended at 45 FR 13092, Feb. 28, 1980; 47 FR 28398, June 30, 1982; 47 FR 51140, Nov. 12, 1982; 47 FR 54083, Dec. 1, 1982; 49 FR 47851, Dec. 7, 1984]

Effective as of
January 1, 1983

HOT SHOT
CONTRACT

This Contract is made and entered into as of the 27th day of August, 1984, by and between (Name) Elvis Dwayne &/or Brenda Boren (440-68-5496) (Street Address) 1945 North Morton Avenue (City and State) Morton, Illinois 61550 ("Contractor"), and Tri-State Motor Transit Co., Delaware Corporation, ("The Company"), the parties agree as follows:

1. The Contractor contracts, for use by The Company, of the equipment described on Exhibit A.

2. The equipment leased hereunder shall be under the exclusive use, possession and control of The Company for the leased period, which shall assume responsibility therefore [sic] for the duration of this Contract. A copy of this Contract will be carried in the equipment described on Exhibit A at all times.

3. The Company will pay the Contractor for the use of this equipment as set out in Exhibit B.

4. Contractor is operating as an independent contractor and will pay all costs of operation of the equipment, including salary and expenses of the drivers, fuel, fuel taxes, Federal Highway Use Tax, ton mile tax, other equipment use taxes, detention and accessorial services, telephone calls, weight tickets, tolls and charges for permits, and base plates. In the event that any

credit or payment is given for a base plate, then such credit or payment shall go to Contractor.

5. The Contractor may maintain a reserve fund of $1000 per unit to cover the loss of items loaned to Contractor by The Company. If such items are loaned by The Company to the Contractor and not returned, the cost of such items will be charged to the Contractor.

6. While any amount of the reserve fund is under the control of The Company, it shall provide an accounting to Contractor of any transactions involving such fund by a monthly accounting to Contractor. Interest shall be paid monthly at a rate equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

7. The reserve fund shall be returned by The Company to Contractor within 45 days of the date termination of this Contract; provided, however, that Contractor has permitted The Company to remove all of its identification as required, and Contractor is not indebted to The Company in an amount in excess of such reserve fund.

8. The Company agrees to procure fire, theft, collision, public liability, personal injury and property damage insurance, Workmen's Compensation coverage and bobtail coverage. However, The Company will be reimbursed for this expense by the Contractor by way of weekly payments equal to six (6%) percent of the Contractor's

gross payments due under this Contract. Costs of the insurance will be furnished to Contractor as available. A copy of each policy of insurance will be furnished the Contractor by The Company upon written request. Also The Company will furnish Certificate of Insurance to Contractor.

9. Where damage to cargo or freight being transported or to a trailer under the control of the Contractor has been incurred and The Company determines that the damage was caused or contributed to by the acts or omissions of the Contractor or the driver of his unit, then the Contractor agrees to reimburse The Company for the total amount of the cargo, freight or trailer damage, up to a maximum of $500 for each incident, which may be deducted from Contractor's settlement if an explanation and itemization is given to Contractor before a deduction is made.

10. This Contract shall commence on the day and at the time the Carrier acknowledges receipt of the equipment on Exhibit A.

11. The Contractor is not required to purchase or rent any products, equipment, or services from The Company as a condition of entering into this Contract.

12. The Contractor is responsible for the loading and unloading of property onto and from company equipment. The Contractor shall receive no

additional compensation for the loading and unloading.

13. The Contractor will furnish all extra equipment as described on Exhibit A.

14. The Company may deduct payments, if applicable, as provided by the terms of the Agreement attached.

15. Except when the violation results from the acts or omissions of the Contractor, The Company shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are preloaded, sealed, or the load is containerized or when the trailer or loading is otherwise outside of the Contractor's control and for improperly permitted over-dimension and overweight loads and shall reimburse the Contractor for any fines paid by the Contractor.

16. Items which are to be paid for by the Contractor may at times be advanced by The Company. The Company shall afford the Contractor an explanation of how the amount of each such item is to be computed. The Contractor shall be afforded copies of those documents which are necessary to determine the validity of the charge back.

This Contract shall be in effect for a period of one year from date, and thereafter shall be automatically renewable on an annual basis; but the Contractor or the Company may cancel this Contract on ten (10) days notice if the other party violates the terms of this Contract.

IN WITNESS WHEREOF, the parties have executed this Contract in triplicate the day and year first above written.

Elvis Dwayne &/or Brenda Boren

By: /s/ Elvis Boren
(Contractor)

TRI-STATE MOTOR TRANSIT CO.
By: /s/ Beverly Blaukat

EXHIBIT A

EQUIPMENT

The COMPANY, for the purpose of Interstate Commerce Commission regulations, acknowledges receipt of the following described tractor and trailer equipment to be used by the CONTRACTOR in the performance of this Agreement with the COMPANY and the CONTRACTOR warrants that the following described equipment conforms to and meets the requirements of all applicable Federal and State laws and the rules and regulations of the Federal Department of Transportation, Interstate Commerce Commission and State authorities:

TRACTOR

Year & Make 1980 Chevrolet Model C-30

Serial No. CCM33AZ125309 Motor No.

License Illinois (State & No.) Unit No. 7163

Weight 8,700 Unit No. 7163

Cab Type 1-ton

TRAILER

Year & Make 1984 Starlite Model

Serial No. 83T1407

License Illinois

Weight 8,440 Trailer Type 8'x42' float

ACCESSORIES

9 Chains
5/16" x 20'

9 Binders
5/16"

3 Tarps
20' Sq. Min.

9 Straps
2" x 20'

2 Seat Belts

1 Fire Extinguisher
20 Pound ABC

3 Triangle
Emergency Reflectors

1 Headache Rack

The Company acknowledges the receipt of the equipment described above this 27th day of Aug., 1985, [sic] at 8:00 o'clock (AM).

Tri-State Motor Transit Co. /s/ Beverly Blaukat
(The Company)

The above Contractor acknowledges the receipt of the equipment described above this 27th day of Aug., 1984, at 8:00 o'clock (AM).

Elvis Dwayne &/or Brenda Boren /s/ Elvis Boren
(Contractor)

EXHIBIT B

PART I — Effective as of January 1, 1983

Percentage Payment

1. The Company will pay seventy (70)% percent of the trip revenue earned by Contractor's equipment. Trip revenue is defined as charges billed to customers, less cost of permits, bridge toll charges, escorts, in-transit storage, diversion or reconsignment fees, impactographs, two-way radios, excess valuation charges, O.D. arbitrary, extra tarp charges, subcontractors of any type, or revenue retained by interline carrier.

PART II

Miscellaneous

1. Contractor may examine The Company's tariffs at any time during office hours at the main office of The Company.

2. The Company will furnish to Contractor at time of settlement a copy of The Company's rated freight bill, with shipper's and consignee's names deleted.

3. Compensation to the Contractor for each shipment is due and payable on the first Friday which falls more than 15 days from the date of delivery of such shipment. This compensation will be withheld only if the required paperwork has not been provided to The Company and completed before compensation is due

and payable. In no event shall compensation be paid more than 15 days after submission by the Contractor of the necessary delivery documents and other paperwork, which are itemized as follows:

(a) Drivers' logs.
(b) Weight tickets, loaded and unloaded.
(c) Shipper's bill of lading.
(d) Signed delivery receipts.
(e) Over-dimensional permits.
(f) Truck movement reports.
(g) C.O.D. charges.
(h) Custom documents.

4. On termination of Contract by either party. Contractor shall deliver all Company property to the nearest Company terminal.

5. Contractor agrees to purchase sufficient fuel in each state in which Contractor operates so that The Company need not pay an additional fuel tax for the miles operated by the Contractor within such state. If Contractor does not purchase sufficient fuel in any state, then The Company will deduct from Contractor's settlement any additional tax that The Company paid to such state.

6. Upon termination of the Contract, Contractor will permit The Company to remove all of its identification, as required by law.

7. A charge of $80 for pick-up and $80 for delivery shall be made by The Company if the pick-up or delivery has not been performed by Contractor. The Company shall pay Contractor $80 for pick-up fee and $80 for delivery fee if the pick-up and/or delivery service is performed by equipment not used for the over-the-road movement.

8. Beginning on April 13, 1982, on all loads hauled by Contractor on a percentage basis, before the division with the Contractor, the line haul charges will be divided by 1.15 to arrive at a line haul revenue base.

The Company will pay the Contractor for all miles traveled, based on the miles shown in the Household Goods Carriers Bureau Mileage Guide, under specific Company direction and dispatch, both loaded and unloaded, (except for the transportation of exempt commodities and intrastate shipments) the sum of 13 cents per mile.

The figures in this paragraph are subject to adjustment by a notice of the Interstate Commerce Commission or by The Company at any time or times upon 5 days prior written notice by The Company to the Contractor.

August 27, 1984
(Date)

No. 89-1939

In The

Supreme Court of the United States

October Term, 1990

TRI-STATE MOTOR TRANSIT COMPANY,

Petitioner,

vs.

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER, BY REASON OF THE INTERSTATE COMMERCE ACT AND THE INTERSTATE COMMERCE COMMISSION REGULATIONS, AND AUTHORIZED INTERSTATE MOTOR CARRIER IS VICARIOUSLY LIABLE AS A MATTER OF LAW FOR NEGLIGENCE ARISING FROM THE OPERATION OF DEFECTIVE EQUIPMENT LEASED BY THE CARRIER, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

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No. 89-1939

In The

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TRI-STATE MOTOR TRANSIT COMPANY,

Petitioner,

vs.

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Elvis D. Boren ("Boren") was the owner of a one-ton truck and trailer (known in the trade as a "hot-shot") which he had purchased in August, 1984, and leased to Tri-State in that same month. The lease was on a Tri-State form designated "Hot-Shot Contract" (Petition for Writ of Certiorari at 27a) and was in force continuously from August, 1984, until December 22, 1985, when it was cancelled. Under this Contract, Boren hauled loads for Tri-State in interstate commerce.

Boren was permitted by Tri-State to use his truck (of which he maintained physical possession) for personal

use when not hauling freight for Tri-State. However, the Contract stated that:

> "2. The equipment leased hereunder shall be under the exclusive use, possession and control of the Company [Tri-State] for the leased period, which shall assume responsibility therefor for the duration of this Contract."

This provision in the lease contract was required by Interstate Commerce Commission ("ICC") Regulations. (49 C.F.R. 1057.12(c)).

On November 29, 1985, while the Lease Contract was still in full force and effect, Boren drove his truck to the Burger Hut in Talala, Oklahoma, to get something to eat. The truck had "Tri-State Motor Transit Co., Joplin, Missouri" and Tri-State ICC Numbers on the cab door.

As Boren approached the Burger Hut, heading northbound on U.S. Highway 169, he observed Respondents' car coming from the north. It was dark that evening and the weather was "rainy and drizzly". Boren stopped for a few seconds, waiting for Appellees' southbound car to clear so he could turn left into the Burger Hut. Neither of his tail lights nor his left turn signal were functioning. (Transcript of Proceedings of June 25, 1987, pp. 377, 378) (Although Boren's last trip for Tri-State had been on October 18, 1985, Tri-State had not inspected the trailer since September 24, 1985). (Transcript of Proceedings of June 25, 1987 p. 466).

At that same moment, William Jack Marlin ("Marlin") was driving an automobile north on Highway 169. When he was 30 feet from the rear of Boren's truck he observed it. He swerved to avoid the truck, steering his car into the

southbound lane of traffic and into a collision with Respondents' automobile.

The collision caused the death of Wayman Jones and extensive personal injuries to the Respondents.

Respondents brought this action asserting that Boren and Tri-State were negligent in failing to maintain the lights on the truck and driving the truck in a defective condition. Respondents further asserted that Tri-State was vicariously liable for the negligence of Boren as a matter of law.

The case was submitted to the jury, which returned a verdict on June 26, 1987 for Respondent Patty Jones, individually and as surviving spouse of Wayman Jones, deceased, in the amount of $800,000.00; for Respondent Janell Renae Jones in the amount of $800,000.00; and for Respondent Laura Atkinson in the amount of $70,000.00. On October 6, 1987, the District Court of Rogers County entered its Order ruling that Tri-State was vicariously liable for the negligence of Boren. (Petition for Writ of Certiorari at 12a). On November 3, 1987, a Journal Entry of Judgment on Verdict was filed granting Judgment in favor of Patty Jones, individually and as surviving spouse of Wayman Jones. Judgment was also entered in favor of the other Respondents. (Petition for Certiorari at 6a).

On September 5, 1989, the Oklahoma Court of Appeals, Division No. 2, in an unpublished memorandum opinion affirmed the Judgments, and Petitioners' Petition for Rehearing was later denied on October 20, 1989. On March 12, 1990, the Oklahoma Supreme Court denied Petitioners' Petition for Certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Congress and the Interstate Commerce Commission have established a regulatory scheme governing the lease of equipment by an ICC authorized carrier. It is the purpose of the regulatory scheme that the carrier-lessee be vicariously responsible to the public for the negligent operation of the leased vehicle without regard to whether, at the time in question, it was being used in the business of the lessee. *Schedler v. Rowley Interstate Transp. Co.*, 68 Ill.2d 7, 368 N.E.2d 1287, 1289 (Ill. 1977).

The trial and appellate courts of the State of Oklahoma correctly interpreted and applied the leased equipment regulations. In finding that Tri-State is vicariously liable for the death of Wayman Jones and the injuries to the Respondents, these courts properly followed the precedent and authority of the U.S. Tenth Circuit Court of Appeals. The result is in accord with every federal circuit court decision rendered since the 1978 amendment of the Interstate Commerce Act and the ICC regulations.

Petitioner seeks to avoid liability by resurrection of common law doctrines or creation of a new exception to the ICC regulations governing the lease of equipment. These regulations require an authorized carrier lessee to have exclusive possession, control and use of the equipment for the duration of the lease and to assume complete responsibility for the operation of the equipment for the duration of the lease.

The injuries to Respondents were caused by the operation of a truck in a defective condition while leased to Petitioner. The imposition of liability upon Petitioner in this instance is precisely what the ICC intended and

mandated by its regulations. Apparently the management of Petitioner had adopted policies and practices which were in direct conflict with the regulations.[1]

The facts of this case fail to establish a substantial federal question that should be decided by this court. Had Petitioner been the owner of the defective vehicle it would have been liable for Respondent's injuries under Oklahoma law as well as ICC safety regulations. Petitioner purchased liability insurance as a precaution against the very situation in which it now finds itself. Petitioner has only itself to blame for the gap in its coverage, for contracting with a financially inadequate lessor and for operation of a defective vehicle due to an indifferent and improper corporate policy with regard to the maintenance and control of leased equipment.

ARGUMENT

1. THE INTERSTATE COMMERCE COMMISSION REGULATIONS HAVE BEEN INTERPRETED IN ACCORDANCE WITH THEIR INTENDED PURPOSE.

Congress enacted the Interstate Commerce Act for the purpose of regulating trucking companies which wish to operate in interstate commerce. The act also governs

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[1] Petitioner's representative at trial testified that it was Petitioner's position that it had no control of a leased vehicle unless it was being used to haul cargo for Petitioner. (Transcript of Proceedings of June 25, 1987, p. 426). The same representative also testified that Petitioner would require repair of a leased vehicle which had inoperative taillights or turn signals only if the vehicle was under dispatch or carrying cargo. (Transcript of Proceedings of June 25, 1987, p. 432).

the use of non-owned equipment. Pursuant to this legislation, the Interstate Commerce Commission adopted numerous regulations including 49 C.F.R. § 1057. The Act and attendant regulations impose strict responsibility on ICC permitted and authorized carriers for the use of leased equipment in order to achieve three goals: (1) prevent ICC carriers from avoiding safety regulations and other restrictions imposed by the ICC upon their equipment and employees by the use of non-owned leased equipment and independent contractors, (2) promote highway safety by insuring that drivers or equipment furnished as part of a lease agreement do not violate safety regulations in their operations, and (3) provide members of the public and shippers with a financially responsible carrier in the event of an accident involving those leased vehicles. *E.g., Indiana Refrigerator Lines, Inc. v. Dalton*, 516 F.2d 795, 796 (6th Cir. 1975).

It is the declared purpose of the regulations to eliminate the problem of fixing responsibility for damages and injuries to members of the public. *Schedler v. Rowley Interstate Transp. Co.*, 68 Ill.2d 7, 368 N.E.2d 1287, 1289 (Ill.1977).

The stringent ICC regulations eliminate the difficulty faced by an injured Plaintiff in determining who controlled the vehicle, the purpose upon which the vehicle was embarked at the time of the accident, and the questions of agency, employee or independent contractor status, frolic and detour, and borrowed employee. *Schedler* at 1289.

There is now little doubt that the provisions of the Interstate Commerce Act and the regulations promulgated thereunder impose liability on the authorized

carrier for any accidents involving a vehicle under lease to it. *See* 49 U.S.C. § 10321(a) (1990), 10927(a) (1) (1990), 11107(a) (1990); and 49 C.F.R. §§ 1057.12(c), 1057.11(1); *E.g., Price v. Westmoreland,* 727 F.2d 494 (5th Cir.1984); *Rodriguez v. Ager,* 705 F.2d 1229 (10th Cir. 1983); *Carolina Casualty Ins. Co. of North America,* 595 F.2d 128 (3rd Cir. 1979); *Wellman v. Liberty Mutual Ins. Co.,* 496 F.2d 131 (8th Cir. 1974).

The Tenth Circuit Court of Appeals examined these regulations and policies and held that they impose vicarious liability for the negligent use and operation of a leased vehicle upon an authorized carrier lessee trucking company as a matter of law. *Rodriguez v. Ager,* 705 F.2d 1229 (10th Cir. 1983). In *Rodriguez,* Sammons Trucking Company, a motor carrier licensed by the ICC and subject to ICC regulations, leased a truck from David Ager. The lease allowed Ager to operate his truck in interstate commerce. At the time of the accident, the tractor being driven by Ager had Sammons' insignia on its door, including Sammons' decals and the identifying docket number assigned to Sammons by the ICC. The truck was not being driven on a mission for Sammons but was being driven by David Ager's brother, John, on a mission of his own.

The Tenth Circuit Court, in construing 49 C.F.R. § 1057, held that the liability of authorized carrier lessees was not formed by the traditional common law doctrine of master-servant relationships and respondeat superior. Rather, the Tenth Circuit found liability existing as a matter of law: "By virtue of a regulation of the ICC." *Rodriguez* at 1231. The *Rodriguez* court held that liability accrued to the carrier lessee by the mere fact that the

negligently operated vehicle was the object of a lease arrangement subject to ICC regulation.

The provisions of 49 C.F.R. § 1057.4(a) (4), in effect at the time of *Rodriguez* were as follows:

> Exclusive possession and responsibilities: Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement.

This regulation was later amended in 1978. The version of that regulation which was in force on November 29, 1985, was 49 C.F.R. § 1057.12(c) which states:

> *Exclusive possession and responsibilities* –
>
> (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

By virtue of this provision, a carrier lessee assumes exclusive possession and complete responsibility to the public for the operation of a leased vehicle commencing with the effective date of the lease contract. The complete responsibility to the members of the public continues until the termination of the lease. As a result of this regulation, Tri-State became vicariously liable for damages to members of the public incurred by reason of the negligent acts of Boren and his operation of the leased vehicle while in a defective condition even though Boren was not on a mission for Tri-State, and even though Tri-State was not aware of the manner in which the truck was being used.

It is undisputed that at the time of the collision the truck, owned and driven by Boren, was under lease to Tri-State and had placed upon it Tri-State decals, ICC permits, and even Tri-State mud flaps. It is also undisputed that, at the time of the collision, the truck leased to Tri-State was being operated by Boren upon a public highway while in a defective condition (i.e. without tail lights or a left turn signal).

Boren, with Tri-State's full knowledge, had physical possession of the truck for his personal use when he was not hauling freight for Tri-State. Tri-State's representative went so far as to testify that "Tri-State Motor Transit only had control of the vehicle when it was actually using it in interstate commerce". (Transcript of Proceedings of June 25, 1987, p.426).

Under ICC regulations, Tri-State was in control of Boren's vehicle for the duration of the lease term. 49 C.F.R. §1057.12 (c). Such control is defined to include actual control, legal control and the power to exercise control. 49 U.S.C. §10102 (7). Thus, Tri-State was deemed to have been in actual and legal control of the truck at the time of the accident.

In reaching its conclusion, the *Rodriguez* court analyzed the legislative history and promulgation of 49 C.F.R. §1057 as well as the cases which have followed it. The Tenth Circuit held:

> The ICC regulation is applicable. The purpose is a praiseworthy one. It seeks to eliminate fly-by-night contracting by requiring the lessee of a vehicle who permits the equipment to be used on this basis to assure responsibility for the accidents of the driver of the vehicle which

> displays its insignia. To fail to uphold the ICC regulations would result in injustice. Trucking equipment such as that here present has a capability for bringing about terrible injuries and damages to life.

Rodriguez at 1236.

The rationale for the imposition of vicarious liability as a matter of law pursuant to ICC regulations was also discussed in *Rediehs Express, Inc., v. Maple,* 491 N.E.2d 1006, 1012 (Ind.Ct.App. 1986) wherein it is stated:

> In short, the policy enunciated in the ICC regulations in the cases make the carrier totally responsible to the injured Plaintiff as a matter of law for negligence of the lessor and its drivers of a leased vehicle. The carrier must, at his peril, exert care in his leasing arrangements and avoid leasing from "gypsies" or fly-by-night, irresponsible truckers. The regulations and cases make the carrier police its lessors as it is policed by the ICC.
>
> Argument is made that these cases create an unfair burden upon the carrier who is held responsible for the frolic and detour of its lessor. We disagree. . . . If the carrier has been derelict in employing an under-insured, financially irresponsible or incompetent lessor, it has only itself to blame.

Petitioner seeks to limit the scope of 49 C.F.R. §1057 (12) to situations in which the leased truck is being used to haul freight in interstate commerce. The statutory basis for this ICC regulation is 49 U.S.C. §11107, enacted in October, 1978. This statute repealed 49 U.S.C. §304. Section 304 (e) authorized the commission "to prescribe, with respect to the use by motor carriers (under leases, contracts or other arrangements) of motor vehicles not

owned by them, *in the furnishing of transportation of property* . . . . (2) such regulations as may be reasonable necessary in order to assure that *while motor vehicles are being so used* the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof . . . ".

When §304 was repealed in 1978 and replaced with §11107, the Congress omitted the phrase "while motor vehicles are being so used" from the successor statute. By this omission, Congress clarified its intent as to the absolute liability of the carrier lessee. In making material changes in the language of a statute, Congress can neither be assumed to have regarded such changes as without significance, nor to have committed an oversight or to have acted inadvertently. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-107 (1941). The omission of the phrase in the recodified statute will be assumed to have been intentional. *See Pirie v. Chicago Title and Trust Co.*, 182 U.S. 438 (1901).

The Interstate Commerce Commission intended that an authorized carrier lessee be subject to vicarious liability to the public at all times during the term of its lease. The *only* exception to the exclusive possession and responsibility requirements of the lease regulation (49 C.F.R. §1057.12(c)) is contained in 49 C.F.R. §1057.12(c) (3) which provides when "an authorized carrier of household goods leases equipment *for the transportation of household goods*, as defined by the Commission, the parties may provide in the lease that the provisions required by Paragraph (c) (1) of this section apply *only during the time the equipment is operated by or for the authorized carrier lessee*". 49 C.F.R. §1057.12(c)(3). (Emphasis added). By

failing to list the exception urged by Petitioner it is clear that the Interstate Commerce Commission did not intend to dilute its regulations by the application of common law doctrines advocated by the Petitioner.

The imposition of vicarious liability in this case facilitates the intended purpose of the ICC regulations. The Interstate Commerce Act and the regulations promulgated thereunder have been interpreted and applied by the Oklahoma Courts in accordance with the intended purpose of the Act and in a manner consistent with the prior ruling of the Tenth Circuit United States Court of Appeals.

2. THE PETITION FOR CERTIORARI RAISES AN ISSUE NOT PRESENTED TO NOR CONSIDERED BY THE COURTS BELOW

Any assertion by Petitioner that the regulations are beyond the scope of authority granted by Congress would be meritless. *American Trucking Ass'ns v. United States*, 334 U.S. 298 (1953). Petitioner has never, at any prior stage of these proceedings, asserted that the Interstate Commerce Commission did not have the authority to adopt lease regulations which impose vicarious liability as a matter of law. Petitioner has thereby waived consideration of this issue. New questions may not, as a general rule, be raised for the first time on a petition for certiorari to this court. *Rogers v. Lodge*, 458 U.S. 613, 628 (1982).

3. SINCE THE RECODIFICATION OF THE INTERSTATE COMMERCE ACT AND THE REVISION OF REGULATIONS PROMULGATED THEREUNDER IN 1978, THE COURTS HAVE CONSISTENTLY IMPOSED ABSOLUTE LIABILITY ON LESSEE CARRIERS FOR THE NEGLIGENT USE OF LEASED EQUIPMENT DURING THE TERM OF THE LEASE.

Petitioner asserts that "the United States Courts of Appeals are rendering conflicting opinions as to the effect of 49 C.F.R. 1057". However, the cases cited by Petitioner, which conflict with *Rodriguez*, were decided prior to the recodification and amendment of the Interstate Commerce Act and the revision of the regulations in 1978. The case of *Leach v. Newport Yellow Cab, Inc.*, 628 F. Supp. 293 (S.D. Ohio 1985) cited by Petitioner, did not involve equipment leased to an interstate carrier or the interpretation of I.C.C. regulations.

Petitioner also asserts that United States Courts of Appeals are rendering opinions that conflict with opinions of state courts of last resort and that state courts are rendering conflicting opinions. Again, all but one of the cases cited by Petitioner were decided prior to 1978. The one exception is the case of *Hershberger v. Home Transport Co.*, 103 Ill.App.3d 348, 431 N.E.2d 72 (1982). Petitioner cites the *Hershberger* case as authority that the conduct of the driver giving rise to injury must have a nexus with interstate commerce. (Petition for Writ of Certiorari at p. 24). *Hershberger* involved an assault and battery totally unrelated to the operation of the leased equipment.[2]

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[2] The court, in dicta, suggested that a lessee carrier would be held liable under ICC regulations for a violation of safety

(Continued on following page)

On page 13 of its brief, Petitioner states that "no other court has interpreted the regulation [49 C.F.R. §1057 (12)] so broadly". Petitioner is not correct. State courts have consistently imposed vicarious liability on the lessee carrier, even though the leased truck was not being used to haul freight in interstate commerce. In *Empire Fire and Marine Insurance Company v. Truck Insurance Exchange*, 462 So.2d 76 (Fla.App. 1985) the Florida Court of Appeals held that a carrier lessee could be held liable for the negligence of the driver of a leased truck who was chauffeuring two women from a lounge to their motel room. Also see *Nationwide Mutual Insurance Company v. Holbrooks*, 371 S.E.2d 252 (Ga. 1988) in which liability was imposed even though the employee of the owner lessor was not driving the truck in interstate commerce at the time of the accident but to his home.

4. NO SUBSTANTIAL FEDERAL QUESTION EXISTS IN THIS CASE THAT SHOULD BE DECIDED BY THIS COURT.

Tri-State asserts that it would not have been liable under Oklahoma law if Boren had been operating a Tri-State *owned* defective vehicle at the time of the accident (Petition for Writ of Certiorari at p. 26). This assertion is without merit. Under Oklahoma law, an owner of a vehicle is liable for damages arising from a defective condition of his vehicle if the defect was readily discernible. *Murry v. Advanced Asphalt Co.*, 751 P.2d 209 (Okl. App.

(Continued from previous page)

standards and could even be liable for an intentional tort if the tort arose out of the operation of the motor vehicle.

1987), *Simmons Trucking Co., Inc. v. Briscoe*, 373 P.2d 49 (Okl. 1962). Similarly, the owner of a motor vehicle who permits another person, either gratuitously or for a consideration, to use the vehicle for the other's own purposes, may be held liable to a third person for personal injury or death or for damages caused by a defective condition of the vehicle of which the owner knew or should have known through the use of ordinary care. *Bush v. Middleton*, 340 P.2d 474 (Okl. 1959). It is undisputed that at the time of Respondents injuries, the vehicle leased to Tri-State was being operated upon the public highway while in a defective condition in violation of Title 47 Oklahoma Statutes §§12-201, 12-208, 12-209, 12-211, 12-219 and 13-101 (1981). In Oklahoma, the violation of a state law in the operation of a motor vehicle is negligence per se. *Garner v. Myers*, 318 P.2d 410 (Okl. 1957). Therefore, had Tri-State owned the defective vehicle driven by Boren in this case, liability would have been imposed upon Tri-State under Oklahoma law in addition to the ICC regulations.

Tri-State apparently appreciated the risk of liability to itself pursuant to ICC regulations even when the non-owned equipment is not engaged in the carrier's business. Tri-State acknowledged that "in addition to the general liability policy, *carriers generally purchase* 'bob-tail' insurance to cover the leased drivers and vehicles when they are not engaged in the carrier's business." (Petition for Writ of Certiorari at p. 27). Tri-State did in fact agree to purchase bobtail coverage for the subject truck in its contract with Boren.

Tri-State's remedy for losses caused by the negligence of its lessors is through indemnification agreements which place ultimate financial responsibility on the

negligent lessor.[3] *Transamerican Lines v. Brada Miller Fr. Sys.*, 423 U.S. 28 (1975).

This court further stated that

> "[i]t is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules.
>
> It is likewise apparent that an important feature of the remedy the Commission devised to eliminate the undesirable practices was the rule that any lease in which the lessor furnished the driver was to be one for 30 days or more. See 49 C.F.R. §§1057.3(a) and 1057.4(a) (3). This served to eliminate the "hard core of the problem," that is, "the owner-operator trip lease and its attendant evils."

Brada Miller at 37.

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[3] In *Brada Miller* this court found that such agreements did not violate Interstate Commerce Commission safety regulations, because such provisions, which place ultimate financial responsibility on negligent lessor, tended to increase rather than diminish protection to the public. *Id.* at 41. This court also pointed out that "[i]t may also be said that the indemnification provision produces an additional source of funds for the one who is damaged or injured." *Id.* at 41. "Although one party [the authorized carrier] is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact." *Id.* at 40.

Accordingly a carrier must, at all times during the term of its lease, control the leased vehicles to whatever extent necessary to be responsible to the public. *See Brada Miller* at 39-40.

CONCLUSION

The Interstate Commerce Act and regulations promulgated thereunder impose liability on the authorized lessee carrier as a matter of law. By the act and regulations, Congress sought to protect the public by promoting highway safety and by requiring that a financially responsible carrier assume exclusive possession, control and use of the equipment and complete responsibility for its operation for the term of the lease. The regulations discourage carriers from leasing from irresponsible operators by imposing complete responsibility on the carrier.

By amending the ICC Act in 1978, Congress made it clear that carrier lessees would be responsible notwithstanding the use being made at the time the negligent act occurs, the only exception being the transportation of household goods. Tri-State seeks to destroy the effectiveness of the regulations by imposing exceptions which are neither found in the regulations nor intended by Congress. The effectiveness of the regulations would be greatly undermined and ICC authority to enforce its regulations would be crippled if interstate carriers were allowed to circumvent their responsibility to the public by the resurrection of the common law doctrines of master-servant and respondeat superior.

Tri-State was well aware of the ICC regulations when it entered its lease. It even purchased insurance providing coverage when the leased equipment was not engaged in its business. Tri-State's remedy is not with the courts but rather the use of indemnification agreements with its lessors and the purchase of additional coverage which protects the public from the operation of defective leased equipment upon the public highways.

Tri-State, and other carrier lessees, benefit from allowing lessor owners to maintain possession of their trucks in violation of ICC regulations. Therefore they should not complain when they are required to assume responsibility.

Pursuant to the foregoing argument and authorities, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1C

49 U.S.C. Sections

§ 10102. Definitions

In this subtitle–

(7) "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means.

§ 10321. Powers

(a) The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle. The Commission may prescribe regulations in carrying out this subtitle.

§ 10927. Security of motor carriers, brokers, and freight forwarders

(a)(1) The Interstate Commerce Commission may issue a certificate or permit to a motor carrier under section 10922 or 10923 of this title [49 USCS § 10922 or 10923] and a certificate of registration to a motor carrier or motor private carrier under section 10530 or this title [49 USCS § 10530] only if the carrier files with the Commission a bond, insurance policy, or other type of security approved by the Commission, in an amount not less than such amount as the Secretary of Transportation prescribes pursuant to, or as is required by, the provisions of section

30 the Motor Carrier Act of 1980 [note to this section], in the case of a motor carrier of property, section 18 of the Bus Regulatory Reform Act of 1982, in the case of a motor carrier of passengers, or the laws of the State or States in which the carrier is operating, in the case of a motor private carrier. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the carrier for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance or use of motor vehicles under the certificate or permit, or for loss of damage to property (except property referred to in paragraph (3) of this subsection), or both. A certificate or permit remains in effect only as long as the carrier satisfies the requirements of this paragraph.

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§ 11107. Leased motor vehicles

(a) Except as provided in section 1101(c) of this title [49 USCS § 11101(c)], the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] that uses motor vehicles not owned by it to transport property under an arrangement with another party to–

> (1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;
>
> (2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect.

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

49 U.S.C. Section 304 (e)(2)
(repealed Oct. 1978)

§ 304. Powers and duties of Commission

(e) Regulations governing use of vehicles owned by others. Subject to the provisions of subsection (f) hereof, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property–

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this part with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

§ 12-201. When lighted lamps are required

Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of five hundred (500) feet ahead shall display lighted lamps and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles. Laws 1961, p. 394, § 12-201.

§ 12-209. Color of clearance lamps – Slide marker lamps Back-up lamps and reflectors

Front clearance lamps and those marker lamps and reflectors mounted on the front or on the side near the front of a vehicle shall display or reflect an amber color.

Rear clearance lamps and those marker lamps and reflectors mounted on the rear or on the sides near the rear of a vehicle shall display or reflect a red color, except the stop light or other signal device, which may be red, amber or yellow, and except that the light illuminating the license plate or the light emitted by a back-up lamp shall be white.

Laws 1961, p. 396, § 12-209.

§ 12-211. Visibility of reflectors – Clearance lamps and marker lamps

(a) Every reflector upon any vehicle referred to in Section 12-208 shall be of such size and characteristics and so

maintained as to be readily visible at nighttime from all distances within five hundred (500) feet to fifty (50) feet from the vehicle when directly in front of lawful upper beams of head lamps. Reflectors required to be mounted on the sides of the vehicle shall reflect the required color of light to the sides, and those mounted on the rear shall reflect a red color to the rear.

(b) Front and rear clearance lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of five hundred (500) feet from the front and rear, respectively, of the vehicle.

(c) Side marker lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of five hundred (500) feet from the sides of the vehicles on which mounted.

Laws 1961, p. 396, § 12-211.

§ 12-219. Signal lamps and signal devices

(a) Any motor vehicle may be equipped and when required under this act shall be equipped with a stop lamp or lamps on the rear of the vehicle which shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than one hundred (100) feet to the rear in normal sunlight, and which shall be actuated upon application of the service (foot) brake, and which may but need not be incorporated with one or more other rear lamps.

(b) Any motor vehicle may be equipped and when required under this act shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or left. Such lamps showing to the front shall be located on the same level and as widely spaced laterally as practicable and when in use shall display a white or amber light, or any shade of color between white and amber, visible from a distance of not less than one hundred (100) feet to the front in normal sunlight, and the lamps showing to the rear shall be located at the same level and as widely spaced laterally as practicable and when in use shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than one hundred (100) feet to the rear in normal sunlight. When actuated such lamps shall indicate the intended direction of turning by flashing the lights showing to the front and rear on the side toward which the turn is made.

(c) Any motor vehicle or combination of vehicles eighty (80) inches or more in overall width, and manufactured or assembled after the effective date of this Code, shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or the left. Such lamps showing to the front shall be located on the same level and as widely spaced laterally as practicable and when in use shall display a white or amber light, or any shade or color between white and amber, visible from a distance of not less than five hundred (500) feet to the front in normal sunlight, and the lamps showing to the rear shall be located at the same level and as widely spaced laterally as practicable

and when in use shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than five hundred (500) feet to the rear in normal sunlight. When actuated such lamps shall indicate the intended direction of turning by flashing the lights showing to the front and rear on the side toward which the turn is made.

(d) No stop lamp or signal lamp shall project a glaring light. Laws 1961, p. 399, § 12-219.

§ 13-101. Vehicles without required equipment or in unsafe condition

No person shall drive or cause to be moved on any highway any motor vehicle, trailer, semitrailer or pole trailer, or any combination of vehicles, unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or occupant or any person upon the highway. Laws 1961, p. 412 § 13-101.

PART 1057–LEASE AND INTERCHANGE OF VEHICLES

AUTHORITY: 49 U.S.C. 304(e) and (f) and 5 U.S.C. 552, 553, and 559.

SOURCE: 44 FR 4681, Jan 23, 1979, unless otherwise noted.

§ 1057.1 Applicability.

The regulations in this part apply to the following actions by motor carriers holding permanent or temporary

operating authority from the Commission to transport property:

(a) The leasing of equipment with which to perform transportation regulated by the Commission.

(b) The leasing of equipment to motor private carrier or shippers.

(c) The interchange of equipment between motor common carriers in the performance of transportation regulated by the Commission.

§ 1057.11 General leasing requirements.

Other than through the interchange of equipment as set forth in § 1057.31, and under the exemptions set forth in Subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) *Lease* – There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

(b) *Receipts for equipment* – Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt. The receipt identified in this section may be transmitted by mail, telegraph, or other similar means of communication.

§ 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 1057.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(c) *Exclusive possession and responsibilities* – (1) The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(2) Provision may be made in the lease for considering the authorized carrier lessee as the owner of the equipment for the purpose of subleasing it under these regulations to other authorized carriers during the lease.

(3) When an authorized carrier of household goods leases equipment for the transportation of household goods, as defined by the Commission, the parties may provide in the lease that the provisions required by paragraph (c)(1) of this section apply only during the time the equipment is operated by or for the authorized carrier lessee.

No. 89-1939 (3)

In The

Supreme Court of the United States

October Term, 1989

TRI-STATE MOTOR TRANSIT COMPANY,

Petitioner,

vs.

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,

Respondents.

REPLY OF PETITIONER

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QUESTION PRESENTED

WHETHER, BY REASON OF THE INTERSTATE COMMERCE COMMISSION REGULATIONS, AN AUTHORIZED INTERSTATE MOTOR CARRIER IS VICARIOUSLY LIABLE, AS A MATTER OF LAW, FOR THE NEGLIGENT OPERATION OF EQUIPMENT LEASED BY THE CARRIER, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

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INTRODUCTION

By their argument, respondents concede that state and federal courts are divided over the question of whether 49 U.S.C. § 11107 and 49 C.F.R. § 1057 were designed to displace the common law doctrine of respondeat superior so as to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of equipment they lease. Respondents have made no attempt to deny or even refute the fact that the courts have been unevenly interpreting this law and regulation.

Instead, respondents attempt only to explain away the existing conflict by arguing that the confusion over the scope and intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057 was eliminated in 1978 when Congress restated the Interstate Commerce Act. However, the legislative history behind the restatement in no way reflects a congressional intent to alter the law as to carrier liability. Despite the enactment and promulgation of the Revised Interstate Commerce Act in 1978, the courts of this country continue to be divided over the question of whether the federal transportation laws abrogate, modify or incorporate traditional common law notions of respondeat superior with respect to the use of leased equipment by interstate motor carriers.

ARGUMENT IN REPLY

In their response to the petition filed by Tri-State Motor Transit Co. ("Tri-State"), respondents provide only three reasons as to why this Court should deny certiorari. First, respondents argue that the enactment of the Revised Interstate Commerce Act in 1978 reflects a congressional intention to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of leased equipment. Second, apparently recognizing that state and federal courts have in fact been interpreting 49 U.S.C. § 11107 and 49 C.F.R. § 1057 at variance, respondents argue that this conflict was eliminated in 1978 when the Revised Interstate Commerce Act was promulgated. Third, respondents contend that the opinion of the Oklahoma court of appeals could have been based on an adequate and independent state ground, and that this Court is therefore prohibited from reviewing the case. For the reasons below, each of these arguments is without merit.

I. BY REPEALING 49 U.S.C. § 304(e) AND RE-ENACTING THAT SECTION AS 49 U.S.C. § 11107 IN 1978, CONGRESS DID NOT INTEND TO MAKE INTERSTATE MOTOR CARRIERS VICARIOUSLY LIABLE, AS A MATTER OF LAW, FOR THE NEGLIGENT OPERATION OF LEASED EQUIPMENT, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

Respondents suggest that the enactment of the Revised Interstate Commerce Act in 1978 reflects a congressional intention to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of leased equipment. Glaringly absent from respondents' argument, however, is the citation to any authority that supports their interpretative conclusion, let alone to any case that even mentions the 1978 enactment. Equally absent from respondents' argument is any discussion of the legislative history behind the revision. Rather, by comparing the language of 49 U.S.C. § 304(e) (1963) to that of 49 U.S.C. § 11107(a) (1990), respondents tenuously argue that the discrepancies between the two laws *inferentially* substantiate the conclusion that carrier lessees are intended to be vicariously liable as a matter of law. However, neither the legislative history nor the applicable post-1978 case law substantiates this conclusion.

In 1978, Congress enacted the Revised Interstate Commerce Act, Pub. L. No. 95-473, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 1420. In revising the Act, Congress repealed 49 U.S.C. § 304(e) (1963) and reenacted that provision as 49 U.S.C. § 11107 (effective October 17, 1978; amended July 1, 1980). *Id.* The reenactment of section 304(e) as section 11107 was only one part of an expressed congressional effort "to *restate* in comprehensive form, *without substantive change*, the Interstate Commerce Act and related laws, and to enact those laws as subtitle IV of Title 49, United States Code." H.R. Rep. No. 1395, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3013 (emphasis added). "In the *restatement*, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete statutes have been eliminated." *Id.* (emphasis added). Although designated a "revision," the Revised Interstate

Commerce Act merely "restates" the laws related to interstate transportation in one comprehensive title. *See generally id.*

Prior to 1978, section 304(e), in pertinent part, read as follows:

> Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property –
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> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and
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> (2) such other regulations as may be reasonably necessary in order to assure that *while motor vehicles are being so used* the motor carriers will have full direction and controls of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, *as if they were the owners of such vehicles*. . . .

49 U.S.C. § 304(e) (1963) (emphasis added).

In restating section 304(e) so as to read as what is today section 11107(a)[1] (see Petition at 20a-21a), Congress expressly referenced those changes that were anything other than a restatement of the former law by stating:

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[1] In 1980, Congress amended 49 U.S.C. § 11107 by designating the existing provision as subsection (a) and adding subsection (b). Motor Carrier Act of 1980, Pub. L. No. 96-296, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 809.

> The section *restates* the source provisions for clarity and to reflect the transfer to the Secretary of Transportation of the Commission's functions related to safety operations. The words "Except as provided in section 11101(c) of this title" are substituted for "Subject to the provisions of subsection (f) of this section" to cite the corresponding revised subsection. The word "regulations" is omitted as unnecessary in view of subchapter II of chapter 103 of the revised title. The word "arrangement" is substituted for "leases, contracts, or other arrangements" to eliminate redundancy.

H.R. Rep. No. 1395, *supra* at 3148; (emphasis added). Thus, even though the phrase "while motor vehicles are being so used" was discarded by Congress in reenacting section 304(e), the purpose for which the statute was designed remained the same. Section 11107 merely restates that purpose (*viz.*, to ensure that interstate motor carriers using leased equipment "have control of and be responsible for operating [the equipment] in compliance with . . . applicable law as if [the equipment] were owned by the motor carrier"). 49 U.S.C. § 11107(a)(4); *see Transamerica Fr. Lines v. Brada Miller Fr. Sys.*, 423 U.S. 28, 36 (1975); 49 C.F.R. 1057.12(c)(1).

Despite the fact that section 11107 (today, section 11107(a)) and its companion regulation, 49 C.F.R. § 1057, address only the treatment of the *equipment* leased by an interstate motor carrier and not the *operator* of the equipment, respondents argue (without the aid of any controlling authority) that, by failing to include the phrase "while motor vehicles are being so used" in section 11107, "Congress clarified its intent as to the absolute liability of the carrier lessee." (Response at 11). Respondents' emphasis on the omitted phrase is misplaced.

Clearly, the phrase at issue was disregarded by Congress as redundant or awkward. *See* H.R. Rep. No. 1395, *supra* at 3013. That phrase indicated only that, *for the duration of the lease*, interstate motor carriers were responsible for ensuring that the leased *equipment* complied with "applicable law" to the same extent as if the carrier *owned* the equipment. 49 U.S.C. § 304(e) (1963); H.R. Rep. No. 2425, 84th Cong., 2d

sess., *reprinted in* 1956 U.S. Code Cong. & Admin. News 4304, 4309; *see* generally *id.* This is precisely what section 11107(a) indicates today, as the language of section 304(e) was merely restated in the more recent statute. H.R. Rep. No. 1395, *supra* at 3013, 3148.

Even though an interstate motor carrier using leased equipment is treated as if it owns the equipment under section 11107 and 49 C.F.R. § 1057, the language of the statute and regulation should not be read so as to imply that the *operator* of the equipment is irrefutably presumed to be within the scope of employment every time he or she is operating the equipment (even if the operator is treated as a "statutory employee" of the carrier). *See, e.g., Schell v. Navajo Freight Lines, Inc.*, 693 P.2d 382 (Colo. App. 1984). Neither the language of section 11107(a)(4), nor that of 49 C.F.R. 1057.12(c)(1),[2] nor the legislative history behind either section 304(e) or section 11107, nor any of the applicable case law, substantiates such a conclusion.

Accordingly, respondents' first argument is wholly without support, defies a logical reading of the language of section 11107(a) and is contrary to the legislative history behind the restatement of section 304(e) in 1978. For these reasons, the argument should be disregarded by the Court as a tenuous attempt, at best, to explain away the conflicting interpretation being given by state and federal courts to the federal law in question.

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[2] In its petition, Tri-State did not expressly raise the issue of whether 49 C.F.R. § 1057 is beyond the scope of authority permitted by 49 U.S.C. § 11107. Rather, Tri-State, in essence, argued that, to the extent the regulation was being interpreted by the courts to impose vicariously liability as a matter of law, such an *interpretation* of the regulation was contrary to the intended effect of the statute. Tri-State believes that interpretation to be in error. If the Court should consider the merits of such an interpretation, Tri-State requests that it be permitted to raise this issue on review if certiorari is granted.

II. THE PROMULGATION OF THE REVISED INTERSTATE COMMERCE ACT DID NOT RESOLVE THE CONFLICT AMONG THE STATE AND FEDERAL COURTS AS TO WHETHER 49 U.S.C. § 11107 AND 49 C.F.R. § 1057 ABROGATE, MODIFY OR INCORPORATE THE COMMON LAW DOCTRINE OF RESPONDEAT SUPERIOR.

In an argument closely connected to their first, respondents suggest that the conflict among state and federal authorities was eliminated in 1978 when the Revised Interstate Commerce Act was promulgated. (Response at 13-14). Again, glaringly absent from respondents' argument is any authority directly substantiating their conclusion.

Because the intended purpose of section 304(e) did not change with the restatement of the Interstate Commerce Act by Congress in 1978, H.R. Rep. No. 1395, *supra*, at 3013, 3148, those cases construing section 304(e) are equally as valid as those construing section 11107. Hence, cases finding that the federal transportation laws do not abrogate the common law doctrine of respondeat superior (e.g., *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967) and *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962)) continue to be at variance with more recent cases, even though the former cases construed section 304(e) and were decided prior to 1978.

Significantly, the Tenth Circuit in *Rodriguez v. Ager* (the case on which the Oklahoma court of appeals primarily relied) did not address the promulgation of the Revised Interstate Commerce Act or the restatement of section 304(e) by Congress in 1978, when it concluded that carrier lessees are vicariously liable as a matter of law. Indeed, the Tenth Circuit recognized the existence of conflicting authority and further relied on several pre-1978 cases construing section 304(e) and the prior versions of 49 C.F.R. § 1057.12(c)(1) in making its decision. See 705 F.2d 1229, 1232-36 (10th Cir. 1983). In fact, no post-1978 case on which respondents rely has even addressed the restatement of section 304(e) in reaching its opinion. See *Rediehs Exp. Inc. v. Maple*, 491 N.E.2d 1006 (Ind. App. 1986).

Moreover, contrary to the position advanced by respondents, several post-1978 opinions construing section 11107 have held that the common law doctrine of respondeat superior is not preempted by the federal transportation laws. *See, e.g., Schindele v. Ulrich*, 268 N.W.2d 547 (Minn. banc 1978); *Curtis, Inc. v. Kelley*, 167 Ga. App. 118, 305 S.E.2d 828 (1983).[3]

In *Curtis*, for example, faced with facts closely analogous to those presented by the instant case, the court affirmed a jury's verdict against the driver of a truck leased to an interstate motor carrier, but reversed the verdict against the carrier on the grounds that, at the time of the accident, the driver was acting outside the scope of his employment. 167 Ga. App. 118, 305 S.E.2d at 829-30. In ruling as it did, the court placed no weight on the fact that the driver was the owner of the truck and was leasing the same to the carrier. *Id. Instead, the court analyzed the case as if the driver and carrier had a traditional master-servant relationship. Id.*; *cf. Great West Cas. Co. v. Norris*, 734 F.2d 697 (11th Cir. 1984) (connected case wherein the court affirmed a declaratory ruling that the driver was not covered by the carrier's insurance).

Thus, *Curtis* directly conflicts with *Nationwide Mut. Ins. Co. v. Holbrooks*, 187 Ga. App. 706, 371 S.E.2d 252 (1988) (erroneously designated as a supreme court opinion), a case on which respondents rely in arguing that no conflict presently exists. The existence of cases such as *Schindele* and *Curtis* accentuate the fact that the courts of this country continue to render conflicting opinions with respect to the question presented by Tri-State's petition and further proves

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[3] Many other post-1978 state appellate court opinions have also held that the federal transportation laws do not abrogate the common law doctrine of respondeat superior. See, e.g., *Wilson v. Riley Whittle, Inc.*, 701 P.2d 575 (Ariz. App. 1984); *Schell v. Navajo Freight Lines, Inc.*, 693 P.2d 382 (Colo. App. 1984); *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926 (Ky. App. 1985); *Reeves v. B & P Motor Lines, Inc.*, 82 N.C. App. 562, 346 S.E.2d 673 (1986); *Midwestern Indem. Co. v. Reliance Ins.*, 44 Ohio App.3d 83, 541 N.E.2d 478 (1988).

the respondents' second argument, like the first, fails to support a denial of certiorari.

III. THE DECISION OF THE OKLAHOMA COURT OF APPEALS IS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND THAT WOULD DEFEAT REVIEW BY THIS COURT.

The opinion of which Tri-State presently seeks review was based exclusively on federal law. In affirming the judgment n.o.v. entered by the trial court against Tri-State, the Oklahoma court of appeals (stating it was compelled to follow the Tenth Circuit opinion of *Rodriguez, supra*), determined that "Tri-State would be vicariously liable to third parties for loss of life or injuries from operation of the truck *under ICC regulations*." (Petition at 4a [emphasis added]). In reaching this conclusion, the appellate court ignored the precedent of its own supreme court in *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962) and relied solely on *Rodriguez*, as well as one foreign state appellate court opinion which, like *Rodriguez*, construed 49 U.S.C. § 11107 and 49 C.F.R. 1057 and imposed liability on the carrier solely by virtue of the regulation.[4]

In the present case, Tri-State's liability under Oklahoma state law was not addressed by the Oklahoma court. To the contrary, the Oklahoma court of appeals, like the trial court below, arrived at its decision by interpreting federal law and found Tri-State to be liable solely by virtue of federal law. Because the decision of the Oklahoma court of appeals was based exclusively on the court's interpretation of federal law and *not* on any "adequate and independent state ground," this Court may properly review that opinion. *See, e.g., Asarco Inc. v. Kadish*, 109 S.Ct. 2037, 2039, 2049 (1989); *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973).

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[4] Specifically, this additional case was *McLean Trucking Co. v. Occidental Fire & Cas. Co.*, 72 N.C. App. 285, 324 S.E.2d 633 (1985). (Petition at 4a).

Respondents' argument that the opinion of the Oklahoma court of appeals *could have been* based on adequate and independent state grounds if Boren has been operating a vehicle *owned* by Tri-State must fail. "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground. . . . " *Mahin*, 410 U.S. at 630-31; *see also Michigan v. Long*, 436 U.S. 1032, 1042 (1983). Accordingly, review of this case is proper.

Moreover, even if the Oklahoma court of appeals had assumed that the leased truck was, in fact, to be treated as if it were owned by Tri-State, and the liability of Tri-State had been judged under Oklahoma State law, no liability would have been assessed against Tri-State pursuant to the decision of the Oklahoma supreme court in *Saul, supra*, 375 P.2d 922 (Okla. 1962). In that case, the Oklahoma supreme court stated that a "common carrier who engaged a trucker to operate under [its] I.C.C. permit . . . stands in the same shoes as a master, or employer. . . . Hence, [its] liability is governed by the doctrine of respondeat superior." 375 P.2d at 928.

Under the supreme court precedent of *Saul*, Tri-State would not have been found liable, as the driver of the truck, Elvis Boren, was outside the scope of his employment at the time of the accident giving rise to the lawsuits below. *See Ellis & Lewis, Inc. v. Trimble*, 177 Okla. 5, 57 P.2d 244 (1936) and *Fairmont Creamery Co. of Lawton v. Carsten*, 175 Okla. 592, 55 P.2d 757 (1936), (holding that an employer is not liable for the tortious acts of its employees which occur outside of the scope of employment). Therefore, even under the hypothetical situation proffered by respondents, the Oklahoma court of appeals could not have properly based its decision on an adequate and independent state ground.[5]

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[5] In addition, contrary to respondents' assertion, Tri-State would not have been found liable as the "bailor" of the truck driven by Boren. Under Oklahoma law, a bailor's liability may not be predicated on a

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CONCLUSION

In their response to the Petition for Writ of Certiorari, respondents have failed to provide any justifiable reason as to why this Court should deny certiorari. Rather than showing that the state and federal courts have been rendering consistent opinions with respect to the question presented by the petition, respondents implicitly concede that a conflict among the courts exists. Further, respondents' argument that the opinion of the Oklahoma court of appeals could have been based on adequate and independent state grounds is contrary to the opinion itself and does not justify a denial of review. For these reasons, Tri-State respectfully reiterates its request that this Court grant certiorari and delineate the scope and intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057.

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defect in the vehicle that arises after the bailment. *Lee Eller Ford, Inc. v. Herod*, 353 P.2d 702 (Okla. 1960) (citing *Bush v. Middleton*, 340 P.2d 474 (Okla. 1959)). Here, because the defective condition of Mr. Boren's truck arose after he had completed his final haul for Tri-State and while it was being used by Boren for his personal use, Tri-State would not be liable under Oklahoma law. (Tri-State, however, might have been liable if it had failed to properly inspect the truck before Boren departed for Texas in October of 1985. Such a result would be entirely consistent with the intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057 that the carrier is deemed responsible for use of leased equipment as for equipment it owns. However, there was no such evidence in this case and the jury returned a verdict assessing zero fault against Tri-State).